Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications, Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 01-88
Southwestern Bell Communications Services, Inc.	)	
d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Missouri	)	

COMMENTS OF MCLEODUSA, INC.

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EXECUTIVE SUMMARY

SWBT's Application is a house of cards built on a foundation future promises of performance rather than a demonstrated track record in Missouri of compliance with §271 requirements.

A track record of compliance does not exist for SWBT in Missouri because SWBT has engaged in a pattern of anti-competitive conduct in Missouri up to the filing of, and even during its 271 application, which was designed to thwart the ability of CLECs to provide facilities-based services in Missouri. The instances of SWBT's anti-competitive conduct in Missouri leading up to its 271 application are numerous and have had a large adverse impact on CLECs.

SWBT improperly refused to recognize CLECs as participants in Missouri's Metropolitan Calling Area Plan ("MCA") by programming its switches to screen to NXX codes of CLEC MCA subscribers. This conduct was without warning to CLECs presently engaging in facilities-based competition in Missouri and/or to CLECs who had invested millions of dollars in order to do so. The result of this conduct was that CLECs were delayed or forced out of the facilities-based service market in Missouri for 18 months until SWBT had already filed its renewal 271 application with the MPSC.

In like fashion, SWBT maintained a constant policy in Missouri of individual case based ("ICB") requesting the pricing, terms and conditions under which it would collocate with CLECs. SWBT resisted every effort made by the CLECs to establish a Missouri collocation tariff. It was not until June of 2000, after SWBT had renewed its 271 application in Missouri that the MPSC opened a docket to consider requiring SWBT to file a collocation tariff. Although SWBT has filed a collocation tariff as a result of this docket, the docket is still open as no pricing has been settled. As the record before the MPSC demonstrates, and as discussed further below, the result of SWBT's ICB approach to collocation was that CLECs were charged vastly excessive rates for items pertaining to

collocation. Some of these rates were in excess of 500% more than what SWBT was charging for the same item in other states. Again the effect SWBTs conduct was that CLEC facilities-based competition was thwarted up to and during SWBTs application for 271 approval.

SWBT's 271 Application before the FCC is much different from any of SWBT's previous 271 applications. In addition to the significant amount of anti-competitive conduct engaged in by SWBT, SWBT's performance is the worst in Missouri of any state in its region. Furthermore, all of the rates for collocation and half the rates for UNE's remain interim in Missouri.

The record before the FCC clearly demonstrates that SWBT's Application should be denied.

TABLE OF CONTENTS

COMMENTS OF MCLEODUSA

McLeodUSA Telecommunications Service Inc. ("McLeodUSA") submits these comments concerning the above-captioned Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communication Services, Inc. d/b/a Southwestern Bell Long Distance (collectively "SBC" or "SWBT") for Provision of In-Region, InterLATA Services in Missouri filed October 26, 2000 ("Application").

I. INTRODUCTION

McLeodUSA is a competitive local exchange carrier ("CLEC"), providing integrated telecommunications services, including local service, to business and residential customers in first, second, third and fourth tier markets in a total of 25 states throughout the Midwest, Southwest, Northwest and Rocky Mountain regions. McLeodUSA is primarily a facilities-based provider, with 396 ATM switches, 50 voice switches, approximately 1.1 million local access lines, and more than 10,700 employees. McLeodUSA has been offering competitive local services to small and medium sized business via resale since 1994 and to residential customers since 1996. McLeodUSA has been providing facilities-based services since 1997. McLeodUSA's average business customer has 5 lines. McLeodUSA has invested over $30 million in Missouri, having installed 3 class 5 DS-3 switches, and owning 450 route miles of fiber optic cable. McLeodUSA employs approximately 400 people and serves over 70 markets in the state. McLeodUSA currently has 5,300 business customers and 1,400 residential customers in Missouri.

The Federal Communications Commission ("FCC" or "Commission") should deny SBC's application because SBC has engaged in a pattern of anti-competitive conduct that has significantly threatened the ability of CLECs to provide facilities-based services in Missouri. As a result, SBC has very little Missouri specific performance data upon which to base its Application. Rather, SBC bases its application primarily on its 271 approval in

Texas, Kansas and Oklahoma and on its future promise to perform under its just filed Missouri Interconnection Agreement and Collocation Tariff. Not only does SBC have no track record of compliance with respect to its brand new interconnection agreement and collocation tariff, both documents are in a state of flux, containing numerous interim rates terms and conditions from which SBC is presently attempting to back away via various pending dockets spun off from its Missouri 271 proceeding. SBC's Application should also be denied because what limited evidence is available indicates that SBC has failed to meet the performance requirements necessary for approval.

Because SBC has succeeded in completely thwarting McLeodUSA's attempts to offer facilities-based services in Missouri, McLeodUSA's ability to offer extensive comments relating to areas of critical import to this proceeding, such as performance measures and operational support systems, is limited. Nonetheless, McLeodUSA has had sufficient experience competing with SWBT in Missouri to enable it to confidently and strongly advocate that SWBT's application be denied. SWBT continues to engage in anti-competitive behavior in Missouri which violates the Federal Telecommunications Act of 1996 (47 U.S.C. Section 251 et seq.)(the "Telecom Act") and continues to significantly fail to meet numerous requirements set forth in the Competitive Checklist contained in Section 271(c)(2)(B) of the Telecom Act.

McLeodUSA is mindful that SBC has received 271 approval in the sister-region states of Texas, Kansas, and Oklahoma, a fact that SBC has made one of the cornerstones of its present application. However, SBC's conduct and performance in Missouri has been much different. In Missouri, SWBT has had a history of circumventing the authority of the Missouri Public Service Commission ("MPSC") and of willingly violating the Telecom Act. In order to understand the difference in SBC's conduct and performance in Missouri, and the resulting impact on CLECs, an understanding of SBC's recent history of anti-competitive conduct is crucial. This history is highlighted by SWBT's improper refusal to recognize CLECs as participants in the Missouri Metropolitan Calling Area Plan

("MCA"). As a result of this refusal, CLECs were denied the ability to offer facilities-based service since April of 1999 until just before the Missouri Commission voted to recommend approval of SWBT's 271 application.

II. SWBT'S IMPROPER AND ILLEGAL REFUSAL TO RECOGNIZE CLECS AS MCA PLAN PARTICIPANTS DENIED MCLEODUSA AND OTHER CLECS THE ABILITY TO OFFER MEANINGFUL FACILITIES-BASED SERVICE IN MISSOURI FOR THE PAST TWO YEARS

A. The MCA Plan

The MCA plan was established by the MPSC's Report and Order in Case No. TO-92-306, Date Effective, January 5, 1993 (the "Report and Order"). The MCA plan is a two-way interexchange, geographically defined, calling service, which is charged on a flat rate. The result is the creation of various calling scopes that give MCA plan subscribers the ability to make and receive toll-free calls in the metropolitan areas of St. Louis, Kansas City and Springfield on a greatly expanded basis. The purpose of the MCA, as articulated in the Report and Order, is "to fashion new expanded calling scope services that will address existing customer complaints, desires and needs."[1] The MCA calling scopes established by the MPSC cross exchange boundaries, local calling scopes of individual exchanges and individual company boundaries.[2] Subscribers to MCA service are allowed to purchase unlimited interexchange calling packages at a flat rate.[3]

In St. Louis and Kansas City, the geographic scope of the MCA is made up of six tiers of exchanges spreading out from the MCA central exchanges. In Springfield the geographic scope of the MCA is made up of three tiers of exchanges spreading out from the MCA central exchanges. With respect to Missouri customers in Kansas City and St. Louis, customers in the MCA central, MCA-1 and MCA-2 tiers automatically receive

[1] MPSC Case No. TO-92-306, First Report and Order, p. 5.
[2] MPSC Case No. TO-99-483, Direct Testimony of Martin Wissenberg, filed Feb. 1, 2000, at p. 3.

[3] *Id.* at 4.

mandatory MCA service. In the other tiers of all MCA exchanges MCA service is optional and customers can choose whether or not to subscribe. In the areas where MCA service is optional, such service is billed as an additive to customers' bills and is classified as a local service. Additionally, in these optional areas, MCA service is designated and provisioned through the assignment of separate NXX central office codes in each exchange. (Wissenberg Direct, p. 4.)

Pursuant to the Commission's Report and Order, all LECs within the geographic scope of the MCA are required to participate in the MCA. SWBT, however, refused to recognize CLEC prefixes as being MCA prefixes and refused to recognize CLECs as participants in the MCA with respect to facilities-based service. (Wissenberg Direct, p. 5)

B. SWBT's refusal to recognize CLECs as participants in the MCA plan, and its implementation of call screening procedures

SWBT refused to recognize CLEC prefixes as being MCA prefixes and refused to recognize CLECs as participants in the MCA with respect to facilities-based service.[4] In order to prevent CLECs that were providing facilities-based service from participating in the MCA, SWBT instituted measures to "screen" CLEC MCA NXX prefixes and, correspondingly, programmed its switches such that CLEC MCA subscribers were not recognized as MCA participants. The result was that when an SWBT MCA subscriber called an MCA subscriber in an MCA zone, the call was processed as a local (non-toll) call if the call recipient was an SWBT customer; but the same call was processed as a toll call if the same recipient were a CLEC customer.[5] (Direct Testimony of Edward J. Cadieux, pp.12-13). SWBT began such call screening in April of 1999 without prior notice to the MPSC or to the CLECs affected. As a result of SWBT's conduct, SWBT's

[4] MPSC Case No. TO-99-483, Transcript of Proceeding at p. 1037 (Testimony of SWBT Witness Thomas Hughes); Wissenberg Direct at p. 5.

[5] MPSC Case No. TO-99-483, Direct Testimony of Edward J.Cadieux, pp.12-13.

MCA subscribers were required to dial 1 plus ten digits and were assessed a toll charge to call a CLEC MCA subscriber, even though that same call required only local, seven digit, dialing and was toll-free, if the recipient was a SWBT customer. Thus, solely by virtue of the former SWBT customer's exercising a competitive choice to switch service to a CLEC, parties calling that customer began receiving toll charges for what would otherwise be free calls. (Wissenberg Direct, p. 5; Cadieux Direct pp.11-13.)

SWBT did not screen the MCA NXXs of the other ILECs, nor did SWBT apply its screening tactics to CLECs customers served via resale resold or UNE-P.[6] (Hughes Testimony, Tr.999-1000, 1009-11.) Despite the efforts of CLECs to obtain an amicable resolution from SWBT or relief from the MPSC discussed *infra*, SWBT continued to screen CLEC MCA NXXs until finally being ordered by the MPSC to cease such conduct in September, 2000.[7] Interestingly, this order was not forthcoming until after SWBT renewed its application with the MPSC to provide In-Region, InterLATA Services in Missouri. The effect of SWBT's MCA conduct and the resulting delay in obtaining relief from the MPSC was to virtually stifle CLEC facilities-based competition in Missouri for approximately 18 months…until SWBT had sought a favorable recommendation from the MPSC for 271 approval.

[6] MPSC Case No. TO-99-483, Transcript of Proceedings pp. 999-1000, 1009-11 (Testimony of SWBT Witness Thomas Hughes).

[7] MPSC Case No. TO-99-483, *Report and Order*, issued Sept. 7, 2000, effective date Sept. 19, 2000. Note, as discussed *infra*, SWBT is apparently still engaging in such screening tactics as of the date the filing of these Comments.

C. SWBT's MCA Conduct was Profoundly Anti-Competitive and Created a Barrier to Entry in Violation of Section 253 for CLECs wishing to provide facilities-based services in Missouri

SWBT's screening of CLEC prefixes and its refusal to recognize CLECs as participants in the MCA plan, made it extremely unlikely that SWBT MCA plan subscribers would be willing to change their service over to a CLEC (or remain with a CLEC after a service change).[8] This is because in situations where the terminating party to a call has switched from an ILEC to a CLEC, the originating caller, who had always made certain calls on a local basis, found themselves having to dial 1 plus ten digits and being assessed toll rates for the same calls that used to be made toll-free with local seven digit dialing.[9] This change in rates and dialing pattern generates customer confusion and frustration, not only for the SWBT customer who is originating the call, but for the CLEC MCA subscriber who receives call and the inevitable complaints from the call originator. As a result, MCA customers are given a strong incentive to remain with, or return to, SWBT, or risk disenfranchising parties that call them for business or personal reasons.[10]

The negative competitive effect of this situation upon CLECs is obvious. CLEC service was stigmatized as being inferior to SWBT service. The new CLEC MCA customer receives inferior service solely as a result of the decision to switch service from SWBT to a CLEC. SWBT's intentional discriminatory action put CLECs at a very distinct and significant competitive disadvantage when attempting to offer facilities-based products and services in competition with SWBT in Missouri MCA plan markets.[11]

The result was that McLeodUSA was forced to delay initiating its launch of facilities-based services in Missouri until it could be confident that its facilities-based

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[8] MPSC Case No. TO-99-483, Direct Testimony of Jeff Oberschelp, filed Feb. 1, 2000, at p. 5.

[9] *Id.*

[10] *Id.*

[11] *Id.*

customers would not be discriminated against by SWBT's practices.[12] Correspondingly McLeodUSA's plans to offer facilities-based service in Missouri has been greatly thwarted. McLeodUSA, which had previously installed 3 class 5 switches in Missouri, saw its investment sitting idle because of SWBT's discriminatory, anticompetitive practice of screening calls to CLEC NXXs.[13]

D. SWBT's Refusal to Recognize CLECs as MCA Plan Participants Only With Respect to Facilities-Based Service is Extremely Disingenuous, as CLECs Have Been Providing MCA Service in Missouri Since 1996.

1. SWBT Refuses to Recognize CLECs as MCA Participants Based On an Improper Interpretation of the MCA Report and Order Establishing the MCA

The MCA Report and Order requires all LECs (not just ILECs) operating within the geographic scope of the MCA to participate in the MCA plan: "The Commission concludes that LECs should implement these plans and the affected exchanges to provide efficient and adequate interexchange calling to their customers." (MCA Report and Order p. 53) Although the MCA Report and Order makes no specific reference to CLECs, the term LEC as it is commonly used refers to both ILECs and CLECs.[14] SWBT disingenuously seized upon the Report and Order's understandable lack of specific reference to "CLECs" contained in the MCA Report and Order (issued in 1992 prior to the emergence of CLECs) and refused to recognize CLECs as proper participants in the MCA service plan. This unduly narrow interpretation of the MPSC's Report and Order establishing the MCA is also squarely at odds with numerous orders issued by the Commission.

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[12] *Id.* at 8-10

[13] *Id.* at 6, 8-9

[14] *See* Telecom Act, 47 U.S.C. Section 153(26), which defines a "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access.

2. The MPSC Has Authorized CLEC Participation In The MCA In Numerous Other Orders Approving Interconnection Agreements and Tariffs

SWBT's failure to provide advanced warning to CLECs or to the MPSC of its imposition of MCA screening is even more troublesome, given the fact that SWBT had previously recognized CLEC resale and UNE-P customers as MCA participants. Subsequent to the MPSC's issuance of the MCA Report and Order, but well prior to SWBT's screening of CLEC MCA NXXs, the MPSC approved numerous CLEC local exchange tariffs that offer MCA service. For example, in Case No. TO-96-440, the MPSC approved the interconnection agreement between SWBT and Communications Cable-Laying Company d/b/a Dial US ("Dial US"). As to the issue raised in that case of CLECs offering MCA Service, the MPSC held: "MCA service, where mandatory, is an essential part of basic local telephone service and as such is a part of the service that LECs must provide to competitors under the Act." (TO-96-440 Report and Order, p. 6)

Subsequently, the MPSC approved Dial US' tariffs, which offered mandatory and optional MCA service. Thus, to the extent that CLECs had entered into interconnection agreements and had tariffs approved by the MPSC that allowed them to offer MCA service, the MPSC had already authorized CLEC participation in the MCA and had already recognized CLEC MCA customers as MCA subscribers. No distinction is made in the applicable tariffs, or in any documentation submitted by SWBT, between facilities-based service and resold service, such that CLECs were provided any reasonable notice that SWBT would screen CLEC NXXs prior to the time SWBT actually began engaging in such conduct.

3. SWBT Never Objected to CLEC Participation In the MCA Until CLECs Began Offering Facilities-Based Service Which Posed a Threat to SWBT's Profits

SWBT did not oppose CLEC MCA participation in MPSC Case TO-96-440, or in conjunction with any tariffs that proposed CLEC provision of MCA service prior to its

screening of CLEC MCA NXXs. Rather, SWBT had consistently "allowed" CLECs to participate in the MCA Plan with respect to the offering of resold service, UNE-P service, and in cases where the CLEC had ported a number from SWBT. (Hughes Testimony, Tr. 999-1000, 1009-11.) Until it suddenly began screening CLEC NXX codes, it had been a foregone conclusion that CLECs were, in fact, MCA plan participants.[15] Indeed the issue of CLEC participation in the MCA was never questioned by SWBT in any of the arbitrations held pursuant to Section 252(b) of the Telecom Act.[16] To the contrary, in one of the arbitrations, SWBT's Executive Director, William C. Bailey, testified before the MPSC that SWBT was not attempting to keep competitors out of the MCA, and was willing to allow CLECs to resell MCA service; the clear implication being that SWBT did recognize CLEC MCA subscribers as MCA participants.[17] If SWBT did not recognize CLECs as MCA participants at the time of Mr. Bailey's testimony, there certainly was no better time to voice this than in response to the MPSC's questions then.

4. CLECs Were Unable to Obtain A Timely Resolution of MCA Issues From SWBT or From The MPSC

Competitive issues concerning CLEC participation in the MCA such as interpretation of the MPSC's MCA Report and Order and regarding whether said Order created a barrier to entry for CLECs were first brought to the MPSC in early March 1998 in case no. TO-98-379. These and other competitive issues relating to the MCA were again reiterated to the MPSC in April of 1999, upon the motion of the MPSC Staff urging the MPSC to initiate Case No. TO-99-483 regarding the MCA. SWBT's anti-competitive screening of CLEC MCA NXXs was first brought to the MPSC's attention by AT&T with its filing of MPSC Case No. TO-2000-15 on July 13, 1999. This case, along with

[15] MPSC Case TO-99-483, Direct Testimony of R. Matthew Kohly, filed Feb. 1, 2000, p.9.

[16] *Id.*

[17] MPSC Case No. TO-97-40 / T0-97-67, Transcript of Proceedings at p. 1444.

TO-98-379, which was filed by two small Missouri ILECs, have both sat virtually dormant with the MPSC since the time they were filed. Although most if not all of the issues raised in these proceedings were resolved by the MPSCs Report and Order in the TO-99-483 Case, it was not until late September 2000 that such Report and Order became effective. On October 18, 1999 various CLECs, joined by the MPSC Staff and Missouri Office of Public Counsel filed a non-unanimous stipulation requesting interim, expedited relief from SWBT's call screening tactics. Failing to sympathize with the CLECs and its Staffs concerns regarding the anti-competitive barrier to entry created by SWBT, the MPSC rejected the non-unanimous stipulation (approximately six weeks after it was filed) and did not even set a hearing to resolve the competitive barriers presented by SWBT's MCA Conduct until May 15, 2000.

Although SWBT began screening CLEC MCA prefixes in April of 1999, it was not until late December of that year that SWBT offered any kind of solution for CLECs wishing to engage in facilities-based competition in MCA markets. Throughout this time period McLeodUSA attempted on several occasions to obtain relief from SWBT's screening tactics and to otherwise be recognized as an MCA plan participant, but was consistently told by SWBT that, since it "was not an ILEC," McLeodUSA would not be recognized as an MCA plan participant. (Wissenberg Direct, pp. 7-8) The "solution" which was finally proposed by SWBT was merely an illegal and financially unattractive proposed memorandum of understanding (the "MOU"), which required that CLECs pay SWBT what amounted to a 2.6 cent per minute competitive loss surcharge for nothing more than the privilege of not having their MCA NXXs illegally screened by SWBT. That SWBT would float such a proposal that so clearly violated the Telecom Act and so clearly was designed for the extraction of monopoly rents from competitors, thereby blatantly confirming SWBT's monopoly grip on its local exchange markets, speaks volumes about the utter lack of competition that existed in Missouri and about SWBT's total confidence that its anticompetitive action would go unpunished by the Missouri PSC.

5. SWBT's Proposed MOU was Neither Legal nor Economically Feasible

Under the proposed MOU, SWBT would have refrained from screening CLEC's MCA NXXs only if the CLEC agreed to pay SWBT 2.6 cents per minute per call originated from a SWBT subscriber that was terminated to a CLEC MCA subscriber. SWBT's imposition of 2.6 cents per minute "originating access charge" violates the Telecom Act in a number of ways, namely the interconnection and dialing parity provisions of Section 251 and the reciprocal compensation provisions of Section 252. SWBT clearly recognized this violation, as manifested by its specific attempt to "exempt" the MOU from these provisions by so stating in the MOU itself.

A very troubling aspect of the MOU was that it appeared to be calculated to destroy the incentive for CLECs to engage in facilities-based competition by making same cost prohibitive. After adding the MOU surcharge to the cost of providing facilities-based service, it became clear to McLeodUSA that paying SWBT's proposed 2.6 cent rate would have resulted in McLeodUSA incurring higher costs for providing facilities-based services, than for providing resale services. (Wissenberg Direct, pp. 11-14) Thus, the incentive to invest in the infrastructure necessary to provide facilities-based services was significantly reduced, if not eliminated, for CLECs, the MOU.

SWBT never sought approval from this Commission for the compensation sought in the MOU (either with respect to the nature of the compensation, i.e., an unprecedented originating access charge, or with respect to the rate charged). That SWBT would not attempt to do so is disturbing and also quite telling with respect to SWBT's motives and attitudes regarding competitive issues in Missouri.

SWBT's MOU charge of $0.026 per minute to terminate calls from SWBT's MCA subscribers to CLEC MCA plan subscribers represents SWBT's "toll" for recognizing CLECs as participants in the MCA plan. This charge, or, more appropriately, this "competitive loss surcharge" is nothing more than an improper revenue replacement ploy

by SWBT to attempt to maintain its profit levels, even if CLECs are successful in winning over current SWBT customers in Missouri markets.[18]

Clearly the proposed MOU was not a viable or good faith "solution" on the part of SBC, but a token gesture, quite late in coming, designed to give SBC the appearance of attempting to cooperate. CLECs responded accordingly by refusing to enter into the MOU. The only exception to this was Intermedia Communication, which did so only as the result of being faced with significant customer losses if it did not sign.

6. SBC Has Continued its Illegal and Improper Screening of McLeodUSA MCA NXX Prefixes To This Day

Despite the fact that the MPSC ordered SBC to cease its MCA screening conduct in its September 2000 order issued in Case No TO-99-483, SBC is currently rejecting all orders from McLeodUSA for UNE-P service for McLeodUSA's MCA customers.[19] Prior to this blanket rejection policy, any McLeodUSA customers who selected MCA service in the optional tiers and who were provisioned service via UNE-P, automatically lost MCA service and had to have service re-ordered via resale.[20] Despite numerous attempts by McLeodUSA, SBC has not provided an adequate explanation for why this is occurring, and has not otherwise corrected the problem. SBC's order system is rejecting all orders for UNE-P submitted by McLeodUSA on which an MCA option is indicated.[21] The error message provided by SBC's system to McLeodUSA indicates that an invalid feature request has been submitted.[22] Information provided by SBC's toolbar system lists available features for one FB resale and UNE-P. However, when this database is accessed

[18] MPSC Case No. T0-99-483, Direct Testimony MPSC Staff Witness William Voight, Filed Feb. 1,2000, pp. 44-45.

[19] Affidavit of Frank Schwartz attached hereto as Exhibit A.

[20] Id.

[21] Id.

[22] Id.

with an MCA prefix the system indicates that the MCA feature is available for resale but not for UNE-P.[23] This demonstrates that SBC has either intentionally continued its improper and illegal screening of McLeodUSA's MCA and NXX prefixes, or that it has significant problems with its operational support systems ("OSS").

III. SWBT'S WILLINGNESS TO CIRCUMVENT THE AUTHORITY OF THE MPSC AND TO DISREGARD THE TELECOM ACT CREATES A VERY ANTI-COMPETITIVE AND UNCERTAIN ENVIRONMENT IN MISSOURI

Equally problematic for CLECs was SWBT's demonstrated willingness to engage in such clear discriminatory practices in violation of the Telecom Act. SWBT's screening of CLEC MCA NXXs violates the Telecom Act in numerous ways. SWBT's conduct: constitutes a barrier to entry in violation of Section 253(a); it violates the interconnection provisions of Section 251(c)(2) by lessening the quality of interconnection provided to CLECs; and it creates dialing disparity in violation Section 251(a)(3). Additionally, SWBT's attempt to force CLECs to sign the MOU violates the reciprocal compensation provisions of Sections 251(b)(5) and 252(d)(2)(A).

When faced with what it perceived as a competitive issue, namely CLEC facilities-based participation in the MCA, SWBT did not seek a clarification of the Report and Order establishing the MCA, and did not otherwise take the issue to the MPSC. Rather, SWBT unilaterally imposed a roadblock for CLECs attempting to offer facilities-based MCA service. Not only did SWBT fail to seek any kind of MPSC approval for its call screening measures, but it failed to give any advanced notice of such measures to CLECs whatsoever.

IV. BECAUSE OF ITS ANTI-COMPETITIVE CONDUCT REGARDING THE MCA AND COLLOCATION, SBC IS UNABLE TO DEMONSTRATE A PAST TRACK RECORD OF SECTION 271 COMPLIANCE IN MISSOURI. AS A RESULT, ITS APPLICATION BEFORE THIS COMMISSION IS BASED ON PROMISES OF FUTURE PERFORMANCE IN VIOLATION OF THE TELECOM ACT.

[23] Id.

A. Legal Standards; promises of future performance are not enough

The ability of a Regional Bell Operating Carrier ("RBOC") to provide in-region, interLATA services is conditioned on strict compliance with section 271 of the Telecom Act. Thus, Southwestern Bell Telephone Company ("SWBT") should not be authorized to provide in-region, interLATA service under Section 271 unless it is able to demonstrate that: (1) it satisfies the requirements for Track A or B entry;[24] (2) it has *fully* implemented an is *currently providing* all of the items set forth in the competitive checklist; (3) the requested authorization will be carried out in accordance with Section 272; and (4) its entry is consistent with the public interest, convenience and necessity. Telecom Act §271(d)(3). As to the *is current providing* standard, the FCC has found that promises of *future* performance have no probative value in demonstrating *present* compliance.[25] To support it's application, an RBOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior. [26]

SWBT's Renewed Application, however, is based largely on the promise of future performance. SWBT's Application is also based in large part on its interLATA approval in Texas, Kansas and Oklahoma, rather than on actual compliance with 271 requirements in Missouri (which it is unable to demonstrate at present).

SBC is essentially saying that since its 271 application has been approved in Texas, Kansas and Oklahoma, that it is entitled to interLATA approval in Missouri, and then it will comply with the section 271 requirements in Missouri. Section 271 simply does not allow such a scheme. The fact that SWBT was granted interLATA entry in Texas and

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[24] RBOCs may enter an application based on one of two "tracks" established under Section 271(c)(1). Track A requires the RBOC to prove the presence of an unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers. Section 271(c)(1)(A)(I). Track B requires the RBOC to prove that no unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers has requested access and interconnection to the RBOC network within certain specified time parameters. Section 271(c)(1)(A)(II). SWBT is applying under Track A.

[25] FCC New York Order, ¶37. States have also adopted this standard, *see In re BellSouth Telecommunications, Inc.'s entry into InterLATA services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U, (Ga. P.S.C. Oct. 15, 1998).

[26] Id.

elsewhere should have no bearing on whether SWBT should be granted interLATA entry in the state of Missouri. Each application made by an ILEC for interLATA entry must be examined independently on its own merits, and the issue of whether an ILEC has satisfied its section 271 obligations must be determined on a case by case basis after review of a totality of circumstances of that particular application.[27]

B. The Missouri Commission eventually acquiesced to SWBT's quid pro quo approach to a favorable section 271 recommendation. This Commission should not be so inclined.

SBC's Renewed Application for section 271 approval before the MPSC relied heavily on this Commission's approval of SBC's Texas 271 interconnection agreement ("T2A"). However, with the gall characteristic of SBC's attitude toward competition in Missouri, SBC altered many of the T2A provisions in its proposed Missouri 271 interconnection agreement ("M2A") in a way that greatly lessened the acceptability of the M2A as compared with the T2A. Indeed the evidence presented at the October and November question and answer sessions before the MPSC and in written comments following same, clearly demonstrated that SBC's proposed M2A fell far short of the T2A. Even more troubling was SBC's attitude towards the filing of its M2A. Throughout the entire 271 proceeding before the MPSC, SBC consistently and steadfastly indicated that the actual filing of its proposed M2A was conditioned on a favorable recommendation from the MPSC concerning approval for SBC's Missouri interLATA entry.[28]

To its credit, the MPSC initially resisted SBC's quid pro quo approach to the filing of an acceptable interconnection agreement. The MPSC essentially told SBC in no

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[27] *Application of Bell Atlantic Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in New York,* CC Docket No. 99-295 Memorandum Opinion and Order, (December 21, 1999) ("hereinafter, "FCC New York Order"), ¶46, and *In the Matter of Application by SBC Communications, Inc., /Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas,* CC Docket No. 00-65 Memorandum Option and Order, FCC 00-238 (rel. Jun. 30, 2000) (hereinafter, "FCC Texas Order"), ¶46.

[28] Testimony of SWBT witness Becky Sparks Transcript of Proceedings October 11-12, 2000, Case No. TO-99-227, ("tr.") p. 2597.

uncertain terms that until SBC filed an M2A which more closely conformed to the T2A, that the MPSC would withhold a favorable recommendation on SBC's renewed application.[29] However, when SBC finally filed its new and improved M2A, the MPSC promptly issued a favorable recommendation for SBC's renewed application. The MPSC issued its favorable recommendation despite the fact that virtually all the CLECs and, most notably the Missouri Office of Public Counsel and the Missouri Attorney General's Office, strongly suggested that the MPSC wait for a period of time to determine whether SBC could actually comply with the terms of, the M2A. Because the MPSC failed to require SBC to demonstrate any sort of track record of compliance with the newly filed M2A, the MPSC thereby essentially acquiesced to SBC's quid pro quo approach. The MPSC's initial objection to such approach, thus, now stands as nothing more than a meaningless issue of semantics (with absolutely no benefit to the CLEC community or to Missouri consumers) as to whether the filing of the M2A came before the MPSC's favorable recommendation or not.

As a result, SBC got precisely what it wanted: a favorable recommendation from the MPSC on its renewed 271 application without ever having to operate under its M2A or having to demonstrate that it could or would comply with the terms and conditions contained in same.

In the wake of SBC's conduct regarding the MCA, CLECs are rightfully left to question when SBC will issue its first M2A surprise, i.e., when will the next MCA-like shoe drop. Indeed, the stage has certainly been set for the next anti-competitive shoe to drop. Many of the rates contained in the T2A are only interim, and there are no less than four dockets pending before the MPSC which have been set to determine additional issues concerning rates, terms and conditions for unbundled network elements ("UNEs"), collocation, DSL loop conditioning, and line sharing and line splitting. The Federal

[29] MPSC Case No. TO-99-227, Transcript of Proceedings, p. 3108.

Communications Commission "FCC" or (the "Commission") has determined that prices for unbundled network elements ("UNEs") must be based on the total element long run incremental cost ("TELRIC") of providing those elements.[30] The Missouri PSC has yet to set TELRIC-based rates in each of the various dockets spun off from SBC's renewed 271 application in Missouri, namely UNE, collocation, DSL loop conditioning and line-sharing and line-splitting. These dockets demonstrate that the M2A is far from settled and that SBC is already attempting to backslide even before receiving 271 approval from this Commission. This creates a very uncertain competitive environment for CLECs in Missouri.

C. The evidence presented overwhelmingly demonstrates that SWBT has failed to meet the standards set forth in the Telecom Act and in FCC orders interpreting same.

Specifically:

a. SWBT has failed to provide collocation consistent with the FCC's requirements;
b. SWBT fails to provide interconnection in accordance with the requirements of Section 251(c)(2) and 252(d)(1);
c. SWBT fails to provide nondiscriminatory access to its network elements including its operations and support systems ("OSS");
d. SWBT fails to provide nondiscriminatory access to unbundled loops including DSL capable loops as required by the FCC's UNE remand and line sharing orders;[31]
e. SWBT does not provide local dialing parity in accordance with the requirements of the Telecom Act;
f. SWBT does not provide reciprocal compensation arrangements in accordance with the requirements of the Telecom Act;
g. SWBT does not make telecommunications services available for resale in accordance with the requirements of the Telecom Act.

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[30] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. for authorization to provide in-Region, InterLATA services in Massachusetts*, CC Docket Mo.01-9, Memorandum, Opinion and Order, FCC 01-130 (Apr 16, 2000) ("Verizon MA 271 Order").

[31] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) (*"UNE Remand Order")* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, and Fourth Report and Order, 14 FCC Rcd. 20902 (*"Line Sharing Order")*

h. Besides failing to satisfy numerous items of the competitive checklist, SBC's Application fails to meet the public interest test set forth in Section 271(d)(3)(C) of the Telecom Act. Specifically SBC has engaged in a significant level of anti-competitive conduct that has greatly restricted facilities-based competition in Missouri and has greatly restricted the competitive choices for Missouri consumers. As a result, SBC's Application should be denied.

V. SWBT HAS FAILED TO COMPLY WITH NUMEROUS COMPETITIVE CHECKLIST REQUIREMENTS

A. Section 271(c)(2)(B)

In its evaluation of past Section 271 applications the FCC has mandated that an RBOC demonstrate that it "is providing" each of the offerings enumerated in the 14-point competitive checklist codified in Section 271(c)(2)(B). [32]

In enacting the competitive checklist, Congress recognized that unless an RBOC has *fully* complied with the checklist, competition in the local market will not occur. [33] Thus SWBT must provide the FCC with "actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior."[34]

The FCC has steadfastly held that applications under Section 271 should be granted only when the local market in a state has been fully and irreversibly opened to competition. [35] Furthermore, each and every checklist item is significant. The FCC has clearly indicated that failure to comply with even a *single* checklist item constitutes independent grounds for denying an application for 271 authority.[36] Thus, strict

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[32] See Application of *BellSouth Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd. 539, ¶78 (1997) (citing *Ameritech Michigan Section 271 Order*, ¶110).

[33] *Ameritech Michigan Section 271 Order*,¶18.

[34] *Id*, ¶55.

[35] FCC Texas Order ¶417; FCC New York Order, ¶423.

[36] FCC Texas Order ¶418; FCC New York Order ¶424.

compliance with each requirement of Section 271 is necessary to ensure that sustainable competition will be realized in local markets. Compliance with the competitive checklist does not end the analysis, however. An RBOC must demonstrate that granting its application will serve the public interest, convenience and necessity.

B. Checklist Item 1: Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)

To meet the required showing that it has "fully implemented" the competitive checklist under Section 271, the RBOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.[37] The Commission has determined that to comply with this standard, for those functions that are analogous to the functions a BOC provides itself, the BOC must provide access to competing carriers in, "substantially the same manner" as it provides itself.[38] The Commission has further specified that this standard requires an RBOC to provide access that is equal (*i.e.* substantially the same as) the level of access that the RBOC provides itself, its customer or its affiliates, in terms of quality, accuracy, and timeliness.[39]

SWBT has failed to meet this checklist item in numerous ways.

1. SWBT Historically Has Provisioned Collocation in Missouri Under Terms and Pricing That Are Discriminatory and Anti-Competitive

For years SWBT provided collocation to CLECs in Missouri on an individual case basis ("ICB") the correspondence of which was excessive pricing and onerous terms and conditions. As a result of SBC's ICB approach in Missouri, CLECs have been presented with great uncertainty with respect to collocation provisioning intervals. This is despite the

[37] *FCC New York Order*, ¶44.

[38] *Id.*

[39] *FCC New York Order, citing Ameritech Michigan Order*, 12 FCC Rcd. At 20618-19.

fact that in almost every other state RBOCs had either been required to file, or had voluntarily filed, collocation tariffs, and despite the fact that SBC had already filed collocation tariffs in Texas, Kansas and Oklahoma. Correspondingly, CLECs have been, and continue to be, placed unjustly at a competitive disadvantage in Missouri, as the ability to predict collocation costs and provisioning intervals is extremely important to a CLEC's ability to make and implement business plans for market entry and expansion.

It was not until several months after SBC had filed its renewed 271 Application with the MPSC that SBC finally filed a proposed collocation tariff in Missouri. Up until that time, SBC had risked the resisted efforts to file such a tariff. Indeed, on February 22, 2000, McLeodUSA along with several other petitioners filed with the MPSC a joint petition for a generic proceeding to require SBC to file a collocation tariff. SBC vigorously opposed this petition and on June 8, 2000 the MPSC dismissed the joint petition. On June 28, 2000 SBC filed its renewed application with the MPSC for 271 approval. On July 13, 2000 the MPSC granted the joint petitioner's motion for reconsideration and established docket for a generic proceeding to require SBC to file a collocation tariff. On October 24, 2000, SBC finally filed a collocation tariff with the MPSC (the "collocation tariff"). SBC's collocation tariff, however, remains in a state of flux.

As part of its Renewed Application before the MPSC, SWBT proposed in its original M2A the use of the Texas collocation tariffs as the basis for its collocation appendices. SWBT, however, in its original M2A altered numerous provisions contained in the Texas collocation tariffs in a way detrimental to CLECs, either through delay, increased costs, or inappropriate restrictions on collocation options.[40] Specifically, SWBT lengthened the time interval for delivering collocation space and performing augments, failed to include reserved space for its own use far in advance of that permitted

[40] See *Comments of Nextlink Missouri on SWBT's Proposed Missouri Interconnection Agreement*, MPSC Case No. TO-99-227, filed August 28, 2000 ("Nextlink Comments") p. 7.

in Texas, failed to submit cost studies to support the collocation rates it proposes in the M2A, failed to propose a process for interim approval pending commission review and has unilaterally reserved the right to alter terms and conditions.[41] SWBT's collocation pricing contained in its original M2A was unreasonably and unjustifiably excessive.

The excessive pricing contained in the M2A is of particular concern not only for CLECs, but also for the staff of the MPSC ("Staff") as well.[42] SWBT offered no legitimate, cost based rationale for the huge discrepancy between its T2A and M2A pricing.[43] SWBT's excessive ICB pricing essentially created a barrier to entry for CLECs wishing to enter or expand Missouri markets. As AT&T witness Steve Turner noted, "it's very difficult to enter a market when there are large numbers of unknowns as to how much it's going to cost you to build out a network, what it's going to cost you to order key components of that network from an unbundled standpoint."[44]

Because the evidence presented to the MPSC overwhelming demonstrated that SBC's prices, terms and conditions for collocation were unreasonable and otherwise non-compliant with checklist item 1, the MPSC indicated that SBC's original M2A did not comply with checklist item 1 and recommended that SBC revise its M2A to conform with the T2A with respect to prices, and to conform to the K2A with respect to collocation terms and conditions.[45]

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[41] *Id.* at 7-18.

[42] Staff states in its Response to SWBT's Updated Record ("Staff's Response") pp. 7-10 that UNE prices contained in the M2A are considerably higher than the prices contained in the Texas collocation tariffs and offered by SWBT in other states. Staff also takes issue with SWBT's purported basis in arriving at its M2A prices.

[43] MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2254.

[44] *Id.* at 2298

[45] Interim Order regarding the Missouri Interconnection Agreement issued February 13, 2001, MPSC Case TO-99-227.

Although SBC revised its original M2A as directed by the MPSC to conform with the applicable portions of the K2A and T2A with respect to collocation, SBC did not, however, so revise its collocation tariff previously filed on October 24, 2000. SBC's intentions with respect to collocation are clear. Agree to the Texas Interim Rates and the Kansas terms and conditions on an interim basis in order to receive a favorable recommendation from the MPSC (and, hopefully, 271 approval from the FCC) while simultaneously attempting to backslide from the interim rates, terms and conditions for collocation contained in the M2A by attempting to get approval for an inferior collocation tariff in the collocation tariff docket pending before the MPSC (TT-2001-298). Although the parties to that proceeding have recently settled most of the terms and conditions issues, SBC has just filed a revised collocation tariff on April 4, 2001 incorporating such resolved issues. More importantly, however, the price terms which will be contained in the collocation tariff have not been settled and await ruling by the MPSC after further testimony, a hearing and briefs.

2. SWBT Has Presented No Evidence Demonstrating Current Compliance with the Collocation Requirements of Checklist Item 1

There is currently no Missouri specific evidence indicating that SBC is in compliance with the collocation requirements contained in checklist item 1, other than SBC's interim agreement to adopt rates, terms and conditions from the T2A and K2A on an interim basis.

A track record of SBC's compliance with respect to collocation is still sorely lacking in Missouri. Staff concurs with the need for SWBT to establish a track record of collocation compliance in Missouri prior to Section 271 approval being granted:

> Staff believes that regardless of what method is used to implement collocation (tariff or M2A), and regardless of what state the offering in Missouri may potentially be patterned after, the Staff fully supports the

> offer being in place for a period of time *before* this Commission makes its decision regarding approval of SWBT's Section 271 application.[46]

A brand new tariff under which no competitor has operated provides virtually no evidentiary support for 271 purposes, as there is no demonstration that competitors are actually able to appropriately compete under the tariff.[47] As noted by AT&T, the unforeseen nature with which the issue of the single point of interconnection within the MCA arose demonstrates that "real world problems" often need time to gel before they manifest deficiencies in contract terms and conditions.[48] Perhaps no better evidence of such a situation is that of SWBT's engaging in MCA call screening procedures and otherwise failing to recognize CLECs as MCA participants, despite the fact that it and the Commission had previously recognized CLECs as MCA participants in numerous orders approving interconnection agreements and tariffs.[49]

As discussed in more detail *infra*, the record presented in this proceeding simply does not indicate that SWBT is providing collocation pricing based on TELRIC principles or that its collocation rates have ever conformed to TELRIC principles.

3. Interconnection Performance

The November Q&A Session before the MPSC demonstrates that interconnecting with SWBT is still very problematic for CLECs. Of great concern is SWBT's extremely high missed due date rate for installing interconnection trunks. These rates are not at acceptable levels and, indeed, seem to be getting worse rather than improving. For

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[46] MPSC Case No. TO-99-227, *Staff's Response To Second Question and Answer Session, and to the Presentation of Earnst &Young*, filed Nov. 30,2000, p.27.

[47] MPSC Case No. TO-99-227, Transcript of Proceedings, pp. 2837-38.

[48] *Id.* at 3106.

[49] A full discussion of such orders and of SWBT's initial acknowledgment of CLEC MCA participation is contained in *McLeodUSA's Response to SWBT's Updated Record* filed in MPSC Case No. TO-99-227 on August 28, 2000 at pp. 5-6.

example, in September, SWBT failed to install interconnection trunks in Kansas City at the rate of 30% and in St. Louis at the rate of 48.8%.[50]

Evidence was also presented in Case No. TO-99-227 at the November Q&A Session before the MPSC indicating that SWBT has represented to CLECs that facilities were not available at a particular location, when in fact SWBT is advertising that it provides service in such location.[51]

Based on SWBT's actual collocation performance record, it is impossible to find that SWBT satisfies the collocation criteria required by Checklist item 1.

4. Single Point of Interconnection

SWBT's failure to provide CLECs with a single point of interconnection within a LATA continues to be a barrier for CLECs in Missouri. SWBT has revised the M2A creating a special definition of an exchange area for MCA purposes. This apparently resolves the single point of interconnection issue when the exchanges of both parties to a call are located inside the MCA. However, as drafted, the current M2A still requires CLECs to have a point of interconnection in every exchange that is outside of the MCA, contrary to the requirements of FCC rules.[52]

SWBT's current M2A fails to provide a single point of interconnection as required by this Commission[53] and ensures that it will be virtually impossible for CLECs to serve many non-MCA markets in Missouri, by requiring CLECs to trunk directly to many exchanges where it is cost-prohibitive to do so.

[50] MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2945.

[51] *Id.* at 2977.

[52] *Id.* at 3001.

[53] FCC First Report and Order ¶209

5. MCA Surcharge

As discussed more fully above SWBT recently engaged in conduct which violated the interconnection provisions of Section 251(c)(2) of the Telecom Act by engaging in the screening of CLEC MCA NXX prefixes, and by attempting to impose an unreasonable and illegal surcharge on CLECs wishing to avoid such screening practices.

C. Checklist Item 2: Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)

SWBT fails to provide nondiscriminatory access to network elements in numerous ways. SWBT's provisioning of collocation to CLECs as discussed in checklist item 1 above, also demonstrates SWBT's failure to provide CLECs, with nondiscriminatory access to unbundled network elements.

1. Operational Support Systems and UNE Provisioning

As a result of SWBT's conduct in screening CLEC MCA NXXs discussed above, SWBT erected a one and a half year barrier to entry for CLECs wishing to provide facilities-based service in Missouri MCA Plan markets. As a result McLeodUSA's experience with SWBT's operational support systems ("OSS") and provisioning of Unbundled Network Elements ("UNE") is somewhat limited. Nonetheless, it is clear to McLeodUSA from it's own direct experience with SWBT, and from the evidence presented by other CLECs, that SWBT has failed to demonstrate that its OSS and UNE provisioning passes muster.

Today, approximately 15-20% of McLeodUSA orders to SBC that are submitted and accepted through the automated LEX system are manually rejected by SBC's order writers without a valid reason.[54] SBC personnel have proven extremely uncooperative toward McLeodUSA in its efforts to obtain an explanation of the basis for the rejection. [55]

[54] Schwartz affidavit, Exhibit A.

[55] Id.

McLeodUSA typically has to make several additional unsuccessful attempts at submitting the order to SBC until the order is finally escalated to an SBC manager.[56] Even more frustrating is the fact that the SBC manager typically accepts the order as first submitted by McLeodUSA, but not before McLeodUSA has experienced much delay and frustration in submitting the order.[57] Additionally, many order submitted correctly to SBC by McLeodUSA are incorrectly entered by SBC order writers.[58] This type of error occurs in approximately 15-20% of all orders submitted by McLeodUSA to SBC for one FB and UNE-P.[59] The impact to McLeodUSA and its customers is harmful. McLeodUSA's customers experience significant service impacting issues such as loss of features, loss of long distance access, along with the resulting delays occasioned by SBC requiring McLeodUSA to resubmit the order.[60] SBC also routinely fails to properly execute supplemental change order dates, such that when a new McLeodUSA customer seeks to change it cut-over date from SBC to a new date, SBC fails to recognize the change and cuts the customer's service on the original cut-over date, thus causing immense customer confusion and frustration for McLeodUSA's new customer.[61] This problem happens on approximately 90% of all supplemental change order dates and causes huge competitive problems for McLeodUSA, as its new customer typically perceives this as a problem caused by McLeodUSA, when in fact it is solely the fault of SBC.

[56] Id.

[57] Id.

[58] Id.

[59] Id.

[60] Id.

[61] Id.

Additionally, and as discussed more fully in McLeodUSA's filings in MPSC Case No. TO-99-227:[62] A) SWBT failed to properly change McLeodUSA's operating company number, resulting in unreasonable protracted billing system problems for McLeodUSA; B) SWBT removed the One Plus Saver Direct product from the Telebranch lines of McLeodUSA's Telebranch customers, although SWBT anti-competitively retained the product for its own customers; and C) SWBT consistently provisions service faster to its own potential new customers than to McLeodUSA's potential new customers, resulting not only in customer frustration but lost business for McLeodUSA.

Although items A and B have been corrected, their existence and the length of time it took SWBT to take corrective measures indicates the inadequacy of its OSS. Item D continues to be a very significant problem for McLeodUSA. McLeodUSA estimates that SWBT's providing of service dates for its own potential customers faster than those provided to McLeodUSA's potential customers, results in customer losses for McLeodUSA of approximately 10 percent in Missouri SWBT markets.[63] Additionally, SWBT fails to meet firm order commitment dates for provisioning of service to McLeodUSA customers at a rate of approximately 30 percent. This of course results in significant customer confusion and frustration and additional loss of business for McLeodUSA.[64]

Other CLECs operating in Missouri have encountered similar problems. The evidence presented clearly indicates that SWBT's operational support systems ("OSS") are not commercially ready. Significant problems exist pertaining to extraordinary and systemic problems during preordering and loop qualification, and SWBT consistently

[62] MPSC Case No. TO-99-227, *Response of McLeodUSA to SWBT's Updated Record,* filed Aug. 30, 2000, pp. 16-18.

[63] Schwartz Affidavit, Exhibit A.

[64] *Id.*

misses deadlines for delivery of loops. [65] The high degree of manual handling by SWBT, along with the risk of error and delay associated with such manual handling, significantly and negatively impacts the ability of CLECs to compete in Missouri markets.[66]

3. SBC Has Had a History of Excessive UNE Pricing in Missouri

SBC has had a history in Missouri of excessive UNE pricing that circumvents TELRIC principles and created barriers to entry for CLECs. A prime example is SBC's pricing for the provisioning of DSL-capable loops. SWBT's pricing for such loops essentially created a barrier to entry for CLECs desiring to provide advanced services in Missouri. The rates proposed by SWBT in its original M2A for conditioning loops in excess of 12,000 feet ranged from 10 to 40 times higher than the rates for the same service in Texas. The rate disparity between these Texas and Missouri rates is stunning. Removal of a repeater cost $289.51 in Missouri as compared to $10.82 in Texas. Removal of a bridge tap cost $489.19 in Missouri compared to $17.62 in Texas. Removal of a load coil cost $727.20 in Missouri compared to $35.06 in Texas.

As a result of these huge rate discrepancies it was virtually impossible for a CLEC to serve Missouri customers at locations more than 12,000 feet from the applicable central office. Thus, CLECs seeking to provide DSL service in Missouri were faced with a very real barrier to entry.

The Staff of the Missouri PSC found that "SWBT charges CLECs significantly more for collocation in Missouri than in Texas, Oklahoma or Kansas" and also found that SWBT's collocation rates constituted "a significant barrier to entry into the local market in Missouri."[67] Based on SWBT's history of anti-competitive ICB pricing in Missouri, Staff

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[65] MPSC Case No. TO-99-227, Transcript of Proceedings, pp. 2342-43.

[66] See MPSC Case No. TO-99-227, *AT&T Post Hearing Comments Proposed Findings and Recommended Steps To Compliance*, filed Oct. 26, 2000, pp. 27-31, and *Office of Public Counsel's Comments Regarding Q&A Session*, filed Oct. 26, 2000, pp. 7-8

[67] MPSC Case No. TO-99-227, *Staff's Comments* filed August 28, 2000, at p. 14.

recommended that any collocation offering should be in "place for a period of time *before* the FCC makes its decision regarding approval of SWBT's 271 application."[68]

3. SBC's M2A Contains Excessive Rates and Far Too Many Interim Rates

As required by the MPSC, SBC's current M2A contains three types of UNE rates:

1. Interim rates developed from case number TO-98-115;
2. Approximately 95 "orphan UNE rates" which had previously never been arbitrated in Missouri, to which the MPSC determined the Texas T2A rates should apply on an interim basis; and
3. Arbitrated rates from case number TO-97-40 arbitrated by the MPSC.

[68] MPSC Case No. TO-99-297, Staff's Response to the Second Question and Answer Session, and to Presentation of Ernst &Young, filed Nov. 30, 2000, p.23.

The FCC has been presented with a much different situation regarding UNE pricing by SBC's application, than it has been faced with in any other 271 application. Virtually half of the rates for UNEs in the M2A are interim and many remain excessively high. The FCC has indicated that it would be willing to grant a section 271 application with a limited number of interim rates but at the same time stressed that it is clearly preferable to review a section 271 application on the basis of rates derived from a permanent rate proceeding. [69] The FCC also indicated that it would be become more reluctant to continue approving section 271 applications containing interim rates as time passed and states had sufficient time to complete permanent rate proceedings. [70] The MPSC has had ample time to complete permanent rate proceedings concerning UNE pricing but has failed to do so and has otherwise failed to demonstrate an adherence to TELRIC pricing. Ninety-five of the UNE rates contained in the M2A have never been arbitrated at all. The UNE rates arbitrated by the MPSC in case number TO-98-115 have remained interim for over two years. In that proceeding, the MPSC conducted a hearing in November of 1997, and the case has been fully briefed since January of 1999, with virtually on activity since then.

The MPSC Staff noted that the rates set in case number TO-98-115 had been interim for over 2 ½ years, and recommended that the MPSC resolve these rates before issuing any recommendation on SBC's application.[71] Staff also determined that the pricing for UNEs set in the Missouri arbitrations were higher in most categories than the prices in Texas, and higher in a number of categories than in Kansas or Oklahoma.[72] Staff also found that there was "no evidence to explain the price differences between Missouri and

[69] FCC New York at paragraph 260.

[70] *Id.*

[71] MPSC Case No. TO-99-227, *Staff's Response to Southwestern Bell Telephone Company's Updated Record,* filed Aug. 28, 2000, at p.6

[72] *Id.* at p. 7

the other states" and concluded that such differences could demonstrate that Missouri's arbitrated rates were not TELRIC based.[73]

Many of the interim UNE rates from case number TO-98-115 (which are now part of SBC's M2A, are excessively high.) For example the Missouri arbitrated rate for dark fiber cross connects is $47.00 versus $1.71 in Texas. The Missouri arbitrated rate for DS1 entrance facilities is $162.30 (recurring) and $471.00 (non-recurring) versus $76.96 and $73.25, respectively, in Texas. The approval of such high rates coupled with the failure to complete arbitrations on UNE rates suggest that the MPSC has not made a commitment (or, at the least, made it a priority) to establish permanent UNE rates according to TELRIC principles.

The MPSC recently established TO-2001-438 on February 25, 2001 to determine the recurring and non-recurring rates for UNEs. As a result it is not certain what the rates for half of the UNEs contained in SBC's M2A will be, whether they will be established in accordance with TELRIC principles, or when they will be established. For this reason alone, the FCC should refrain from granting SBC 271 approval in Missouri until such time as the pricing set for UNEs is demonstrably brought into compliance with TELRIC and in compliance with FCC orders.

McLeodUSA concurs with the comments regarding UNE pricing submitted by PacWest Telecom, Inc. and EL Paso Networks, LLC., and by NuVox Communications in this proceeding.

4. Performance Measures and Remedies

Perhaps even more troubling than the problems caused by SWBT's OSS, is SWBT's attempts to avoid responsibility for such problems as demonstrated by its watering down of performance measures and remedies. SWBT's performance remedy plan consists of two elements, performance measures and penalties. The primary purpose

[73] *Id.*

of a performance remedy plan is to prevent backsliding once an RBOC has received approval from the FCC to provide in-region interLATA service. Contrary to SWBT's professed desire to do in Missouri what it did in Texas, with respect to performance measures and remedies, SWBT has once again made major changes in its M2A from that proposed in the T2A. SWBT has proposed to drastically reduce the penalty provisions for failing to meet performance measure requirements, and fails to include the proper amount of disincentives to prevent anti-competitive conduct. The per occurrence structure of SWBT's remedy plan together with is proposed very low liquidated damages sanctions fails to provide meaningful deterrence to SWBT to engage in anti-competitive conduct and most certainly will not adequately compensate CLECs damaged by such conduct. SWBT's remedy plan for Missouri does little more than to help insure that SWBT maintains its monopoly control of Missouri markets. As such, SWBT's performance measures and remedy plan are clearly not in the public interest, and certainly do not demonstrate a competitive environment that is irrevocably open.

5. Potential Improper "Special Construction" Charges

Due to the delay in initiating facilities-based services in Missouri caused by SWBT's anticompetitive MCA practices, there are other potential areas of discriminatory access that McLeodUSA expects to encounter in Missouri as its facilities-based offering grows. One of those is SBC's practice of imposing discriminatory construction charges on CLECs when SBC claims there are no spare copper loop facilities available to provision a loop to an end user. Given the small number of UNE-L orders submitted by McLeodUSA to date in Missouri, such charges have not yet been experienced. However, McLeodUSA understands that SWBT uses the bona fide request ("BFR") process to provision loops in such circumstances. It was Ameritech's reliance on the BFR process that was first challenged by CLECs in Michigan. After rulings in Michigan and Illinois that Ameritech's practice was unlawful, SBC-Ameritech unilaterally modified its policy to eliminate use of the BFR process, but still attempted to impose special

construction charges through other processes. State regulators in Illinois, Ohio and Indiana have continued to reach the conclusion that assessing construction charges to CLECs to provision UNE loops is unlawfully discriminatory under the Telecom Act. The fact that McLeodUSA has no similar experience in Missouri to date is of no comfort. It took over two years of attempting to provide facilities services in Michigan, Illinois and Indiana before this issue came to light. Again, this experience speaks volumes about the need to have an actual track record of competition before considering an RBOC application for 271 approval.

D. Checklist Item 3: Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

E. Checklist Item 4: Local loop transmission from the central office to the customer's premises, unbundled from switching or other services.

1. Line Sharing and Line Splitting

SWBT has failed to submit sufficient evidence that it provides line sharing in a nondiscriminatory basis in Missouri. SWBT's October performance reports indicate that it has provisioned virtually no line sharing to Missouri CLECs. Furthermore SWBT's past history regarding the terms upon which SWBT proposes to offer line sharing under the M2A "cause barriers and cause increased costs and delay and provisioning problems."[74] For example SWBT's original M2A prevents a data CLEC from line splitting with a UNE-P CLEC, and discriminates against voice CLECs by preventing a data CLEC from using SWBT splitters, cross-connects, equipment or OSS, if such voice CLEC wishes to provide voice service. (Section 4.11.5.) Such discriminatory terms were not included in the Texas

[74] MPSC Case No. TO-99-227, Transcript of Proceedings, p. 3080.

interim terms. SWBT's refusal to provide CLECs who provide voice service via UNE-P with access to SWBT deployed splitters (though it provides data CLECs with same) inhibits such CLECs ability to use the full functionality of the loop, and to deliver advanced service to voice customers:

2. This discriminatory limitation on access to the splitter will severely limit the 3.number of CLECs with whom a UNE-P provider can partner to offer advanced services, because many rely on the SWBT-deployed provider. In turn, this practice will inhibit competition for voice service using UNE combinations, because UNE-P entrants will be constrained in their ability to win voice customers who demand advanced services.[75]

4. It is still unclear given the Line Sharing Docket pending before the MPSC (TO-2001-440) as to what the prices terms and conditions for line-sharing and line-splitting will be in Missouri.

F. Checklist Item 5: Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

G. Checklist Item 6: Local switching unbundled from transport, local loop transmission, or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

[75] MPSC Case No. TO-99-227, *AT&T Comments to November Q & A Session,* filed Nov. 30, 2000, p. 28.

H. Checklist Item 7: Nondiscriminatory access to: (I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

I. Checklist Item 8: White pages directory listings for customers of the other carrier's telephone exchange service.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

J. Checklist Item 9: Nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

K. Checklist Item 10: Nondiscriminatory access to database and associated signaling necessary for call routing and completion.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

L. Checklist Item 11: Telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

M. Checklist Item 12: Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

As discussed more fully above, SWBT has not been in compliance with this checklist item by programming its switches to treat calls from its own MCA subscribers to

CLEC MCA subscribers as toll calls. By doing this SWBT imposed toll charges and one-plus ten digit dialing based solely on the fact that the called party selected a competitive local exchange carrier to provide service. The fact that SWBT is purportedly reprogramming its switches in an effort to cease its screening of CLEC MCA NXX prefixes after having been ordered to do so by the MPSC, does not erase the fact that SWBT willingly engaged in this conduct in the first place, and ceased to do so only after being so ordered by the MPSC. The fact also remains that SWBT has still not complied with the MPSC's order in the MCA case and is still failing to properly recognize CLEC MCA subscribers who receive facilities-based service as MCA participants.

N. Checklist Item 13: Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)

As discussed above, SWBT's attempt to impose a 2.6 cent per minute MCA surcharge as a condition of allowing CLECs to participate in the MCA plan violates the reciprocal compensation requirements of Section 252 (d)(2) of the Telecom Act and demonstrates a recent past failure to comply with this checklist item. Additionally, the MPSC in its September 2000 MCA Report and Order mandated the use of bill and keep inter-company compensation for all MCA traffic, thereby requiring the unilateral rewriting of previously negotiated interconnection agreements which provided for reciprocal compensation.

O. Checklist Item 14: Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

As discussed more fully above, SWBT consistently fails to meet firm order commitment dates for the turn-up of service to McLeodUSA resale customers and consistently provisions service faster to its own customers than to McLeodUSA customers.

As this Commission may know, McLeodUSA's initial entry into many of its markets was through the resale of Centrex services. In many states, this entry was resisted by RBOCs who either maintained, or attempted to institute, restrictions on the resale of such Centrex services. Typically, these restrictions would prohibit the resale of the service to "unaffiliated" end users, or to end users on "non-contiguous property," with the result being the inability of a reseller to aggregate users in multiple locations into a single Centrex system.

The Commission dealt with this issue for SWBT several years ago, when it preempted an attempt to impose similar limits on the resale of SWBT's Centrex service in Texas.[76] Despite this holding and despite SWBT's promises in an earlier 271 related docket before the Missouri PSC to eliminate its restriction on Centrex resale consistent with the FCC's Texas preemption ruling, SWBT continues to maintain a restriction on resale in its Missouri tariffs regarding "Plexar-Custom" service. That tariff provides that the "Use of Plexar-Custom Service for other than administrative stations by the customer of record is prohibited."[77] As long as SWBT continues to maintain this tariff provision in Missouri, it cannot meet the requirements of Checklist Item #14.

VI. Performance Measurements

The evidence presented in this case demonstrates that SWBT's operations support systems ("OSS") and provisioning of resale and UNE service is not sufficient and adversely affects the ability of CLECs to compete. The performance data presented demonstrates that in many areas SWBT's performance is substandard, continuing, and in some cases deteriorating. The performance data highlights the need for SWBT to

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[76] Public Utility Commission of Texas, CCB Pol 96-13 et al., FCC 97-346, 9 CR (P&F) 958 (released Oct. 1, 1997).

[77] P.S.C. Mo-No. 35, General Exchange Tariff, Section 33, 3rd Revised Sheet 34.01.

demonstrate an adequate track record of compliance under an adequate M2A for a sustained period of time.

A. SWBT's Performance in Missouri Fails To Demonstrate Checklist Compliance

As noted by Staff, SWBT's level of performance in Missouri is the lowest among the five state SWBT region; Missouri has experienced lower performance in terms of successfully meeting PM objectives. In addition, the Missouri specific results indicate SWBT's performance has remained low in comparison to the other state results, and has even declined.[78]

In fact SWBT's overall success ratio for Missouri has dropped to 82.5 percent in the months of August, September and October of this year.[79] The evidence clearly demonstrates that SWBT has failed to comply with a number of crucial performance measurements including the following:

PM 1-12 (average pre-order response time-EDI protocol translation time)

PM 2-08 (pre-order response time-actual loop makeup data requested and returned)

PM 2-16 (pre-order response time-dispatch required-variegate)

PM 7.1-01, 7.1-02 (percentage of mechanized completions returned within one day of work completion)

PM 7.1-02 (percentage of mechanized completions returned within one day-EDI)

PM 10.1 (percentage of manual rejects received electronically and returned within X hours)

PM 10.1-01 (percentage of manual rejects received electronically and returned within five hours)

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[78] Staff's response to the Second Question and Answer Session, and to presentation of Ernst and Young filed November 30, 2000, in Case No. TO-99-227, p.11.

[79] Id. at 12

PM 10.2-02 (percentage of orders that receive SWBT-caused jeopardy notifications)

PM 13-02 (order process percentage flow-through-LEX)

PM 17-01 (Billing completeness)

PM 28-07, 28-08, 28-09, 28-10 (percentage of resale UNE-P installations confirmed within the customer requested due date) (this performance measure continues to show that CLECs are not receiving the requested due date a substantial percentage of the time)

PM 29-03, 29-06 (percentage of SWBT-caused missed due dates)

PM 35-12 (percentage of trouble reports within ten days of installation-UNE-C orders-no field work)

PM 38-05 (percentage of missed repair commitments-UNEs-dispatch)

PM 43-07 (average installation interval-ISDN/PRI)

. PM 58-09 (percentage of SWBT caused missed due dates-DSL)

PM 59-08 (percentage of trouble reports within thirty days of installation-DSL-no line sharing)

PM 60-03 (percentage of missed due dates due to lack of facilities-BRI Loop)

PM 62-09 (average delay days for SWBT missed due dates-DSL)

PM 65-08 (trouble report rate-DSL-no line sharing)

B. The Remedy Plan Contained in the M2A Is Woefully Insufficient To Protect Against Backsliding and Fails To Recognize SWBT's History of Anti-competitive Conduct In Missouri

1. Introduction.

To ensure that SWBT's monopoly controlled local exchanges are irreversibly opened to facilitate development of effective local competition, an effective backsliding mechanism must be in place to prevent SWBT's service quality to CLECs from deteriorating after being granted 271 relief. McLeodUSA strongly believes that SWBT's

proposed backsliding mechanism, the Texas Remedy Plan ("TRP"), to use in Missouri is fundamentally flawed in meeting this criteria for several reasons.

2. The TRP lacks the necessary "teeth" to compel SWBT to provide adequate service to CLECs.

a. Penalty amounts.

The penalties that SWBT is subject to under the TRP are relatively minimal. Indeed, in an Illinois Commerce Commission public meeting on service quality, an SBC representative acknowledged that such remedy plan assessments are merely the cost of doing business. The fact that SBC holds this view of the performance remedies means that SWBT's poor performance that harms competition may be viewed internally by SBC as a cost effective decision in comparison to losing customers to competitors if its performance were adequate. A remedy plan that fosters that kind of attitude towards wholesale performance by an RBOC is a remedy that will doom competition. McLeodUSA believes that the TRP will not foster development of competition in Missouri. This is especially important since, as noted elsewhere in these comments, there is virtually no facilities-based competition in Missouri today due to SWBT's anticompetitive MCA actions.

Additionally, remedies should be based on the expected financial gain to SWBT from impeding competition by providing sub-standard service to CLECs. A review threshold for total remedies should be set no less than the FCC's recommendation of 36 percent of "Net Revenue," or $126,036,360 for SWBT (see Table 1 below for calculations). However, in light of the post-271 remedial actions of the FCC and New York Public Service Commission that raised the penalties for which Bell Atlantic New York was subject to, McLeodUSA recommends an initial review threshold of 44 percent or $154,044,440 per year. If a remedy cap is established exceeding the review threshold, its value should be based on an economic and financial analysis of the expected financial

gain to SWBT from deterring competition, adjusted for the probability of detection and punishment inherent in the performance plan. A remedy plan should not contain n absolute remedy cap because the cap reduces the effectiveness of the remedy plan with no offsetting benefits. Indeed, a cap enables SWBT to calculate its total liability, encouraging it to maintain its perception that remedies should be viewed as a cost of business to maintain monopoly power. Other state commissions have recognized this fault of remedy plans like the TRP. For example, the Michigan PSC recently stated that there was no valid reason to place a cap. [80]

3. The TRP fails to deter anti-competitive conduct.

Several features of the TRP restrict SWBT's exposure to liquidated damages and penalties to a level that cannot be expected to deter conduct that is discriminatory or denies CLECs a meaningful opportunity to compete. Those same limitations mean that the TRP will not adequately compensate McLeodUSA when they are injured by such conduct. While the McLeodUSA takes exception to the annual cap on liability, their primary concern is with other features of the plan that virtually ensure that SWBT never will approach that cap, despite poor wholesale performance. As the FCC has said, "it is important to assess whether liability under an enforcement mechanism . . . would actually accrue at meaningful and significant levels when performance standards are missed. Indeed, an overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure." *Bell Atlantic New York* ¶ 437.

The TRP fails this test in many ways. Some examples: its calculation of damages and penalties based on volume of CLEC transactions ("per occurrence"); its classification of important measures as "low" so that very small damages multipliers apply; its placement of low caps; and, its deferral of Tier 2 penalties until SWBT has reported performance

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[80] **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 9**

failure for CLECs in the aggregate (average) for three consecutive months. In all of these examples, the TRP allows serious performance failures to go without serious sanction.

The TRP does not provide adequate damages or penalties for performance measurements involving small transaction volumes. Because the TRP TRP calculates both damages and assessments predominantly on a "per occurrence" basis, it necessarily produces limited sanctions at low volumes. Even if the TRP's per occurrence multipliers were set at reasonably compensatory levels for liquidated damages purposes – and at $25 to $150 they are not – those same multipliers will have little deterrent effect so long as they are being multiplied against only dozens, or even hundreds of transactions. Nor does the prospect of Tier 2 assessments at a maximum of $500 per occurrence offer significant deterrent effect. Compounding this shortcoming is the fact that SWBT obtains the greatest return from anti-competitive behavior in the early stages of market development. Nascent competition is the most vulnerable to anti-competitive conduct by monopolists, as new entrants struggle for a toehold in the market.

Second, the TRP's "per occurrence" approach does not mean that sanctions will apply to each CLEC transaction in which SWBT missed the parity or benchmark requirement. When SWBT's monthly performance on a measure shows that SWBT was sufficiently out of parity or off of the benchmark to yield a z-score worse than the critical z-value, the TRP uses a formula to determine how many "occurrences" will be used to calculate liquidated damages (the same formula applies in calculating Tier 2 assessments after three months of consecutive violation for all CLECs). SWBT first calculates the performance level that would have yielded a z-score equal to the critical value (*i.e.*, what is the worst performance SWBT could have had that month on that measure and still achieve a passing score on the z-test). The difference between SWBT's actual reported performance for the CLEC and this minimum required performance level is compared and expressed as a percentage of the minimum required performance level. That percentage then is multiplied by the number of CLEC observations reported by SWBT under the

measure during the month to determine the number of "occurrences" on which damages or assessments will be based. Although this can lead to a number of occurrences that is greater than the total, the TRP truncates the occurrences to 100%. Thus, the methodology is mathematically inconsistent and flawed.

To illustrate, assume that SWBT reported a 1.5-day interval for its retail and a 3.0-day interval for a CLEC on an average installation interval measure, where SWBT had provisioned 100 units for the CLEC during the month. Assume that the z-test showed that these results represented a parity violation, and that the worst performance SWBT that would have passed the z-test on that month's data was an average interval of 2.0 (*i.e.*, an average of 2.0 for the CLEC, compared to 1.5 for SWBT, would have produced a z-score equal to the critical z value). SWBT's actual reported performance for the CLEC (3.0) exceeded this minimum required performance level (2.0) by 50%. Multiplying 50% times the 100 units provisioned for the CLEC that month under that measure, SWBT would pay damages based on 50 "occurrences." Only the transactions reported for the CLEC within the specific geographic and product classification where the performance violation occurred are used in calculating the "occurrences." Under this example, even if SWBT installed every CLEC order in 3 days, where 2 was required to meet the statistical parity test, SWBT would pay damages based on only half of those transactions.

Under the TRP, damages are determined by multiplying the number of occurrences, calculated as described above, by a fixed amount. The plan includes a table of these multipliers, which range from $25 to $150 per occurrence in the first month of violation, to an oddly computed maximum of $400 to $800 per occurrence in the sixth consecutive month of violation and thereafter. Within a given month, the multiplier chosen depends on whether the measure is classified for Tier 1 purposes as "high," "medium," or "low."

Also, any actual occurrences of poor performance associated with a measure that happened to pass the parity test (perhaps even by random variation) will remain

unremedied. Thus, the ability of each of the measures to generate remedies effectively is capped. Even so, some of these per "occurrence" measures have additional, even smaller caps applied. Indeed, there are some measures that are not remedied on a per "occurrence" basis in the TRP. They are capped immediately as soon as they fail. There is no provision in the TRP for increasing consequences as a function of severity for those measures.

More egregiously, the TRP does not afford CLECs an opportunity to present evidence on what likely damages a CLEC would incur as a result of SWBT's discriminatory treatment. The multipliers set in the liquidated damages table were adopted by the Texas PSC without any evidence, much less an evidentiary hearing and fact finding, regarding the damages that a CLEC is likely to sustain from SWBT performance violations on various measures. Liquidated damages of $25 will not compensate a CLEC for late-provided loop qualification information if the CLEC loses an xDSL customer as a result. Even liquidated damages of $150 are dubious compensation if a missed due date has that same result. Certainly these liquidated damages multipliers do not account for the consequential damage to CLECs whose entry into a developing market, such as the markets for advanced services, is thwarted or retarded by discriminatory wholesale support. These amounts also do not take into account the economic benefit to SWBT from essentially driving a customer back to SWBT as a result of poor wholesale service performance. This complicated computational scheme obscures the above observations. Regardless of the adequacy of these multipliers for compensatory purposes, they are inadequate to serve as serious consequences for noncompliance. If the plan calls for payments that do not reach a reasonable level of compensation, these penalties become essentially unenforceable. McLeodUSA is not the only party that feels that the remedy payments in the TRP are inadequate. In Michigan, the Michigan Commission shares these concerns that the TRP will not provide sufficient remedies and incentives. In fact, the Michigan Commission ordered in its April 17, 2001 Order that "the company shall

incorporate into the remedy plan a multiplier of 2 for all Tier 1 liquidated damages and Tier 2 assessments."[81]

Additionally, because SWBT has chosen a per occurrence approach, the TRP's liquidated damages provisions (Tier 1) almost by definition cannot provide the type of penalty that would suffice to deter SWBT from providing inferior or inadequate wholesale support. Thus, the need for a separate (Tier 2) consequence structure under the plan. Tier 2 of SWBT's proposal, however, does not fill the gap so the TRP remains an effective deterrent to anti-competitive behavior. Tier 2 does not fill the gap in the plan's deterrent impact because no Tier 2 penalty applies until after SWBT reports three consecutive months of failure on a measure. This fact represents one (of many) serious flaws in the TRP, particularly as it applies to nascent services, because, so far as the plan is concerned, SWBT can respond to an emerging CLEC service with two months of discriminatory wholesale support and face no penalty. By the time Tier 2 penalties come into play, the damage to CLECs' nascent services may have been done.

Further, Tier 2 assessments are based on the same purportedly compensatory multipliers used in the liquidated damages table for violations that extend into a third month. This amount would be paid to the state, over and above liquidated damages paid to CLECs for those same violations. However, as long as total CLEC transactions are low, which may be the case for some time while new entrants gain a market toe-hold, particularly if CLECs have difficulty obtaining the required wholesale support, Tier 2 threatens SWBT with assessments of no more than a few hundred thousand dollars while it protects a statewide monopoly worth hundreds of millions of dollars. Moreover, not all the measures get into Tier 2, only a subset deemed by SWBT to be critical. This means that there are gaps in the ability of the Texas Tier 2 to associate consequences with

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[81] **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 17**

discriminatory behavior. Furthermore the three-month requirement effectively reduces the chance of random variation type 1 errors to zero, while still allowing type 2 errors of virtually any magnitude. Again, given the complete lack of competitive activity in Missouri at this time due to SWBT's anticompetitive MCA actions, this necessarily means that SWBT's penalties in Missouri will be inconsequential to them – the cost of doing business in keeping CLECs out of the market.

The few exceptions for which the TRP sets sanctions on a "per measure" basis, *e.g.*, collocation, do not adequately address the lack of incentives provided under the plan as it applies to measures where CLEC observations are reported in small volumes. Also, it does not increase with severity. Not a single provisioning, maintenance, or ordering measure is subject to a per measure assessment under the plan. In practice, however, many measures are being reported in very small volumes. Given the state of competition in Missouri and the level of product and geographic disaggregation in the performance measures, SWBT is reporting very small volumes for many measures, even on an "all CLEC" basis. Without a broader set of minimum per measure sanctions, there is no basis for concluding that the TRP will act as a real deterrent to performance failures by SWBT in the nascent stages of competition over a new service or with a new market entrant.

4. The Texas Remedy Plan is a "penalty escape plan".

The TRP combines layers upon layers of forgiveness and "protection" to *prevent* the payment of remedies. That is why SWBT supports the proposal here in Missouri. The plan includes arbitrary classification of performance measures into low, medium, and high categories for purposes of paying remedies, which govern the size per occurrence damages or assessments associated with each measure. The Michigan Staff, for example, opposed the TRP's arbitrary classification of performance measurements into low, medium, and high categories for purposes of paying remedies. According to the Michigan Staff, "Ameritech's proposal to give different weights to each measurement is very subjective and controversial and there is no need to attempt to identify which

measurement should be afforded more weight. Deficiencies in any area can result in a CLEC loss of customer."[82]

Furthermore, in it's April 17th order, the Michigan Commission ordered that "the Commission does not agree that priorities should be assigned to the performance measures. The Commission agrees that assigning priorities has different effects on different market strategies and creates numerous disputes about the priority for each of the more than 150 measures. Ameritech Michigan shall therefore collapse the priorities into a single category that will be treated as Ameritech Michigan proposed for the 'medium' priority"[83]

Other areas of concern with the TRP include SWBTs attempt to use exclusions such as force majeure events and problems caused by third party systems and equipment for avoiding remedy responsibilities. In Michigan, the Michigan Commission orders in its April 17, 2001 order that "The Commission concludes that Ameritech Michigan's plan provides unjustified exclusions. As the Staff notes, the performance measure business rules should define when noncompliance is excused, and force majeure events should not affect Ameritech Michigan's service to the CLECs any differently than they affect its service to its retail customers. Furthermore, the May 27, 1999 order rejected the view that force majeure should be an excuse for discriminatory performance. May 27, 1999 order, p. 16. The same analysis holds for problems with third-party systems and equipment. If Ameritech Michigan has designed its systems so that unexpected events disproportionately affect service to the CLECs, or has permitted third parties to design its systems in that manner, that is not a reason to excuse the discriminatory conduct. The Commission

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82 **November 24, 1998 Michigan Staff Comments in Case No. U-11830, p. 17-18**

83 **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 7**

therefore rejects the proposed exclusions of liability, except for the exclusions based on CLEC acts or omissions."[84]

5. The TRP does not employ appropriate statistical methodology.

The TRP adds arbitrary layer of forgiveness by applying a statistically unjustified version of the z-test to measures for which the performance standard is a fixed benchmark. In fact, in Michigan, the Michigan Commission ordered in their April 17, 2001 order that "statistical tests should not be applied to the benchmark standards. Those are set at less than 100%, which leaves sufficient flexibility for the random errors that are addressed by the statistical tests applied to the parity standards."[85] The plan chooses a fixed critical value approach, which is more appropriate for controlled experimentation than to the observational data collection technique that characterizes the adopted performance measures in Missouri, for all sub-measures. Furthermore, the plan concentrates too narrowly on controlling the statistical errors that negatively affect SWBT and completely ignores statistical errors that harm CLECs' potential to become viable competitors.

Additionally, McLeodUSA believes that the TRP should require that the parity standard be implemented by comparing the service provided to the CLECs to the service that SWBT provides to its retail customers and its affiliates. The TRP does not include this comparison to its affiliates. In Michigan, the Michigan Commission ordered in its April 17, 2001 order that "The Commission concludes that the comparison to service provided to Ameritech Michigan's affiliates as well as service to its own retail customers should be part of the performance remedy plan. Section 251 of the FTA requires that Ameritech Michigan not provide inferior service to the CLECs as compared to its

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84 **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 13-14**

85 **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 11**

affiliates…..A comparison to the performance it provides its affiliates or retail customers, whichever is better, shall therefore be part of the remedy plan."[86]

6. The TRP is not self-executing.

The TRP stipulates that SWBT will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves an Interconnection Agreement between a CLEC and SWBT containing the terms of the TRP in its Agreement. McLeodUSA believes that such a plan should be available to CLECs regardless whether they are interconnecting with SWBT via an interconnection agreement or a tariff. The Michigan Commission agrees, as it states in its April 17, 2001 Order that "The Commission agrees with the Staff that the remedy plan should be available whether a CLEC interconnects by agreement or tariff."[87]

The TRP leaves Missouri CLECs facing the likely prospect of protracted and contentious legal proceedings merely to realize the meager damages and assessments offered by the plan. Under the TRP, SWBT has no liability for damages or assessments to the extent that its noncompliance with a performance measurement is the result of non-SWBT problems associated with third-party systems or equipment, which could not have been avoided by SWBT in the exercise of reasonable diligence.

Given SWBT's widespread reliance on systems and equipment that have been designed, manufactured, and/or serviced by third parties, this added exemption has the potential to turn every instance of reported noncompliance into a negligence issue – *i.e.*, could SWBT have avoided the parity or benchmark failure by exercising reasonable care (reasonable diligence). There is every likelihood that SWBT will invoke this provision with frequency, if only to defer the realization of liquidated damages liability and discourage CLECs from attempting to collect. This term alone has the potential to

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86 **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 13**

87 **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 16**

eviscerate self-enforcement from the plan, and it forecloses any conclusion that the TRP provides for damages and assessments that are "automatically triggered," "without resort to lengthy regulatory or judicial intervention."

The TRP also excuses SWBT from paying liquidated damages or assessments for reported noncompliance that is "the result of an act or omission by a CLEC that is in bad faith."[88] Fewer phrases have proved more pregnant with litigation than "bad faith." The TRP offers examples of "bad faith," such as a CLEC's unreasonable failure to provide forecasts to SWBT, that threaten to equate that term with simple negligence. Again, this excuse is wholly unjustified in the context of the TRP, which separately protects SWBT to the extent that reported noncompliance results from CLEC acts or omissions in breach of contract or that otherwise are unlawful. Adding the "bad faith" excuse will do nothing other than foster disputes and create the opportunity for SWBT to claim "bad faith dumping" or "unreasonable failure to forecast" whenever new CLEC products, geographical expansions, or increasing CLEC volumes tax SWBT's systems. Additionally, when there are disputes in terms of performance, that includes remedy ramifications, the TRP proposes that remedy payments be held in an escrow until after the timely commencement of a show cause proceeding. McLeodUSA believes it is wrong to permit SWBT to delay fulfilling its requirement to make remedy payments. The Michigan Commission Order agrees that at an early stage of the development of competition, the that withholding of payments by SWBT could adversely affect the development of competition."[89]

7. SWBT's effort to secure a rubber-stamping of the SBC Remedy Plan should be rejected.

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88 **T2A Remedy Plan – Attachment 17, section 7.2, p. 7**

89 **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 14-15**

There is a recurrent theme in Randy Dysarts affidavit that, because a similar plan was approved by Texas, a couple of neighboring states, and accepted by the FCC, there is a need to rubber stamp the TRP in Missouri. McLeodUSA urges the Commission to conduct an independent examination of the TRP in light of the non-existence of the lack of competition in Missouri.

Additionally, SWBT's assertion that its Plan somehow has support outside of Texas and a couple of neighboring states is incorrect. In Michigan, the staff opposed essential elements of the TRP. The Michigan Staff filed comments in MPSC Case No. U-11830 opposing virtually every element of the

8. Remedy payments should be made via check, not bill credits.

The TRP also provides for remedies by bill credits by stating. Requiring payments via check is a far more pro-competitive requirement than using a bill credit because CLECs should not be placed in the uncomfortable circumstance of having to transact a certain amount of business with SWBT in order to receive remedies for past poor performance. In Michigan, the Michigan PSC ordered that payments should be by check or other direct payment method, which simplifies administration and enforcement and provides for payment soon after Ameritech Michigan provides substandard performance.[90]

9. The TRP confers upon SWBT unfettered discretion to use permutation testing for small sample sizes.

SWBT asserts permutation testing, which is used to more accurately calculate remedies for small sample sizes, is part of the TRP. SWBT does not mention, however, that it, rather than the Missouri PSC, has the ability to use (or not use) permutation testing as it sees fit. Furthermore, in the TRP, remedies are assessed on a per-occurrence basis, based on the volume of CLEC transactions. This necessarily means that when transaction

[90] **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 14**

volumes are small that the remedies will not deter SWBT from discriminating against CLECs. Certainly, an effective remedy plan should adequately deter SWBT from discriminating ;irrespective of order volume.

10. The TRP should include a mechanism that will hold SWBT accountable to provide service at minimum levels for both wholesale as well as retail customers.

If SWBT were given 271 approval, the possibilities are very real that service quality provided by SWBT could deteriorate for both its wholesale and retail customers. Most states have employed minimum standards of performance for retail customers, and if SWBT were to fail to meet these minimum service levels, it would cause the CLEC to be in violation of the state regulation as well.

This failure to meet a state's minimum required service level is of significant concern to McLeodUSA because it causes harm in multiple ways -- (a) the McLeodUSA customer's frustration, which rightfully should be directed at SWBT, is aimed at the McLeodUSA, leading many times to loss of that customer; (b) the wrongfully placed ill-will against any particular CLEC often balloons into mistrust of all new competitors by the harmed customers and the many others with which he/she shares the poor service story; (c) McLeodUSA, as a telecommunications provider in Missouri may be held responsible for the violation of regulations through fines or credits and waivers to customers; and (d) the public interest calls for regulators to promote choice between good quality, not equally poor quality service providers. Even beyond the limited number of services for which retail end user standards exist, some performance areas are so critical, such as prompt restoral of high capacity loops for the business customers whose livelihoods depend on them, that minimum acceptable performance intervals are also required.

Due to these concerns, McLeodUSA has proposed a "Parity with a Floor" concept to be put in place as a backstop for key measures where parity is used as the performance standard, which concept has been endorsed by recent state commission rulings.

McLeodUSA views this proposal as a means to obligate SWBT to provide a minimum level of service to all customers and to motivate SWBT to improve upon that base level wherever possible. For these key measures, parity will be the primary performance standard, however, for the sake of both retail and wholesale customers; parity must be at a minimum level to be considered as reasonably adequate service. Simply stated, parity of poor performance is still poor performance. The TRP does nothing to address this legitimate concern which is imperative to development of competition.

The TRP proposed by SWBT does not provide legitimate incentive to provide CLECs such as McLeodUSA with acceptable service quality after they gain 271 approval. Moreover, the meager remedies payable under the TRP ensures future service deterioration is likely to occur. Thus, SWBT would continue to have an incentive to hamstring the development of local exchange competition, and to offer poor retail services. SWBT has one reason, and one reason only, for proposing the TRP: Remedy payments under the TRP are so low as to constitute only a "cost of doing business," and thus would not prevent anti-competitive behavior and, therefore, would allow SWBT to offer low quality wholesale services to CLECs. This, in turn, will slow down – if not altogether stymie – the development of local exchange competition in Missouri.

A remedy plan must incest SWBT to provide acceptable wholesale services to the CLECs. A remedy plan with nominal penalties, like the TRP, is not a remedy plan at all, but is really nothing more than phony window dressing that enables SWBT to continue to monopolize the local telecommunications market in Missouri.

Table 1:

Data for Missouri from ARMIS 43-01 (2000)
(Downloaded from FCC Web Site: http://www.fcc.gov/ccb/armis/)

Year	Company Name	Row_#	Row_Title	Total_b	State_g	Interstate_h
2000	Missouri Bell	1090	Total Operating Revenues	2,002,884	1,271,597	482,949
2000	Missouri Bell	1190	Total Operating Expenses	1,358,954	824,497	298,403
2000	Missouri Bell	1290	Other Operating Income/Losses	25,070	-12,390	-5,234
2000	Missouri Bell	1390	Total Non-operating Items (Exp)	98,824	26,314	-297
2000	Missouri Bell	1490	Total Other Taxes	124,904	102,736	18,608
2000	Missouri Bell	1590	Federal Income Taxes (Exp)	120,533	73,281	43,279
2000	Missouri Bell	1915	Net Return	N/A	N/A	117,722
2000	Missouri Bell		Access Lines (ARMIS 43-08)	2,236,603		

FCC's Net Return Calculation*

		Net Return	36% Net Return	44% Net Return
Missouri Bell	"Net Return"	350,101	126,036	154,044

*Calculations in testimony based on FCC NY 271 Order at ft. 1332: "To arrive at a total "Net Return" figure that reflects both interstate and intrastate portions of revenue derived from local exchange service, we combined line 1915 (the interstate "Net Return" line) with a computed net intrastate return number (total intrastate operating revenues and other operating income, less operating expenses, non-operating items and all taxes)." Following the FCC's guidelines, the 'Net Return' is [117,722 +1,271,597+-12,390 - (824,497+26,314+102,736+73,281)]= $350,101.

VII. SWBT HAS FAILED TO SATISFY THE PUBLIC INTEREST ANALYSIS

A. Section 271(d)(3)(C)

The public interest analysis contained in Section 271(d)(3)(C) of the Telecom Act is an independent element of the 14-point checklist.[91] SWBT has argued otherwise, indicating that compliance with the 14-point checklist alone is all that is necessary for

[91] FCC Texas Order ¶417; FCC New York Order ¶423.

approval of its application. "The public interest is truly that, the public interest, and it should not be used a as means to add to the 14-point checklist."[92] To the extent SWBT is arguing that the MPSC or the FCC should not consider relevant factors outside the checklist, SWBT clearly then has misinterpreted the FCC's ruling in this regard. As indicated by the FCC:

> The public interest analysis is an independent element of the statutory checklist and, under normal cannons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as congress expected. Among other things we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application.[93]

Thus, the FCC could find that SWBT had satisfied each and every item on the 14-point checklist and still deny SWBT's renewed application if the public interest analysis requirements are not met.[94] The FCC has indicated that all relevant factors are to be

[92] MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2496. (SWBT Witness Hughes)

[93] FCC Texas Order ¶416; FCC New York Order ¶423.

[94] In addition to the language contained in the FCC's New York and Texas Orders concerning the public interest analysis the FCC has also indicated that "although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to the local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrance after receiving in-region, interLATA authority." Application of *Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order, 12 FCC Rcd. 20542, ¶30 (1997) ("FCC Michigan Order").

considered in the public interest analysis and has indicated a number of factors as being probative. These factors include: performance monitoring with self executing enforcement mechanisms to ensure compliance, optional payment plans for new entrant CLECs for the payment of non-recurring charges to lessen unreasonably high up-front costs, whether all pro-competitive entry strategies are available to new entrants in different geographic regions in different scales of operation, and whether such strategies are available to other requesting carriers upon the same rates terms and conditions, state and local laws that impact on competition, and the existence of discriminatory or anticompetitive conduct on the part of the RBOC.[95]

The record of this case reflects that it is not in the public interest, for a variety of reasons, to recommend that SWBT be granted interLATA authority.

B. SWBT's Refusal to Recognize CLECs as MCA Participants

SWBT's conduct concerning the MCA plan demonstrates a high degree of discriminatory and anticompetitive behavior. SWBT unilaterally and without warning to CLECs began programming its switches to screen CLEC MCA NXX prefixes such that CLEC MCA customers were not treated like participants in the MCA plan. SWBT engaged in this behavior despite the fact that numerous previous MPSC orders recognized CLECs as MCA plan participants. SWBT engaged in this behavior despite the fact that it, itself, had recognized CLECs as participants in the MCA plan with respect to resold services, UNE-P services, and ported numbers. SWBT refused for months to negotiate a solution for CLECs, and resisted every effort the CLECs made to obtain expedited relief from the MPSC. When it did finally come to the table, SWBT attempted to circumvent the MPSC's authority and impose an improper 2.6 cent MCA surcharge on CLECs which also violated several provisions of the Telecom Act. Additionally, as a condition for CLEC participation in the MCA, SWBT overrode existing interconnection agreements

[95] FCC Michigan Order ¶387, 391, and 393-397.

proving for bill-and-keep intercompany compensation and imposed reciprocal compensation. SWBT's willingness to act unilaterally and circumvent the Commission's authority in such blatant violation of the Telecom Act creates a very uncertain competitive environment for Missouri CLECs.

C. Competitive Environment in Missouri

As a result of SWBT's MCA conduct CLECs are left to wonder as to when the next MCA-like shoe will drop, i.e., when will SWBT next decide to unilaterally circumvent the MPSC's authority and/or engage in conduct in violation of the Telecom Act. SWBT's anticompetitive conduct creates uncertainty for CLECs attempting to compete in Missouri. Uncertainty is also caused by the regulatory environment in Missouri as well.

D. Regulatory Relief

There appears to be two different time tracts for obtaining relief from the Missouri PSC: one for SWBT and another for CLECs. Recent proceedings before the Commission demonstrate this disparity.

In case TO-99-483 (the (MCA case) the Commission did not provide a hearing date until a year had expired from the date the case was commenced, and for over 2 years after the MPSC was first made aware (in MPSC Case No. TO-98-379) of the existence of competitive issues concerning the MCA affecting CLECs. Attempts made by the CLECs to obtain expedited relief in order to gain at least interim access to the MCA plan was rejected by the MPSC. In sharp contrast, in Case No. TC-2001-20, in a case where SWBT was on the opposite end of a call blocking situation, similar to the one it created for CLECs in the MCA, SWBT obtained a hearing and order from the MPSC within 3 and 7 days, respectively, from the date it filed its complaint. Furthermore, even though TC-2001-20 centered on whether SWBT would be directed to block certain CLEC traffic,

McLeodUSA did not receive notice from the MPSC of the hearing until after the hearing was held.[96]

Additionally, the Commission granted SWBT's request for an expedited schedule in Case no. TO-99-227, over the objection of CLECs, Staff, and Office of the Public Counsel, at a time when the Commission had not yet issued its Report and Order in the MCA case.

As previously discussed, the Missouri PSC has had the TELRIC docket submitted for a decision since January 1999. Obviously, it is extremely difficult to make business decisions on investing in a state if the underlying UNE cost is unknown. This delay is intolerable and again evidences the Missouri PSC's indifference for promoting development of UNE-based competition in Missouri.

CLECs must be able to obtain timely relief under the same time frames as SWBT regarding competitive issues, or the ability of CLECs to compete in Missouri is greatly restricted.

E. Disparate Treatment Of CLECs Regarding Municipal Rights Of Way

Although SWBT is not required to obtain telecommunications franchises before installing or operating its facilities in the public rights of way McLeodUSA and other CLECs are. McLeodUSA has been the victim of onerous franchise requirements imposed by Missouri municipalities. McLeodUSA has often been charged excessive franchise fees that have no relationship to the municipality's costs of maintaining the right of way, and has often experienced unreasonable and costly delays in obtaining a franchise. Since such onerous requirements are not imposed on SWBT by Missouri municipalities, local governments are not managing their rights of way on a competitively neutral basis in violation of Section 253(c).

[96] MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2924.

The November Q&A Session highlighted the degree to which onerous franchise requirements and charges imposed by some municipalities create barriers for CLECs wishing to serve Missouri markets. SWBT attempted to downplay the competitive affect of such barriers, by suggesting that SWBT, itself, is not treated much differently than CLECs with respect to obtaining municipal rights-of-way.[97] SWBT does admit, however, that it believes it is exempt from the requirement of obtaining a franchise from each municipality.[98] Indeed, SWBT routinely notifies Missouri municipalities that it obtained statewide franchise from the Missouri Secretary of State in 1882 that exempts it from onerous franchise charges and terms which many Missouri municipalities seek to impose on other carriers.

Although SWBT may not be the direct cause of the disparate treatment of CLECs by Missouri municipalities, the fact remains, however, that SWBT routinely and affirmatively seeks disparate treatment from Missouri municipalities and is, in fact, the beneficiary of such disparate treatment. The fact also remains that such disparate treatment by many Missouri municipalities constitutes a violation of Section 253 of the Telecom Act, and creates adverse competitive conditions for CLECs which do not exist for SWBT.

Although not directly part of the fourteen-point checklist, disparate treatment of CLECs regarding municipal rights-of-way relates very directly and significantly to the public interest analysis set forth in Section 271 of the Telecom Act. Clearly Missouri markets can not be said to be open nor guaranteed to remain open if CLECs are effectively barred from offering service in various Missouri municipalities as the result of onerous franchise requirements and charges.

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[97] *Id.* at pp. 2766-68.
[98] *Id.*

It has been McLeodUSA's experience and the experience of other CLECs[99] that franchise requirements and charges imposed by many municipalities constitute a barrier to entry for CLECs wishing to do business in Missouri markets. McLeodUSA has experienced indefinite delays and/or onerous charges to obtain and keep franchises for municipal rights-of-way from Missouri municipalities. Such conditions make serving such municipalities virtually impossible. As a result of onerous franchise requirements, McLeodUSA has been forced to completely circumvent some Missouri municipalities.

F. SWBT's Anti-Competitive Conduct Was Intended To Restrict CLECs From Offering Facilities-Based Service In Missouri Until SWBT Was Ready To Obtain 271 Approval

The MPSC Staff indicated that it is "extremely disappointed…that no residential customers are being served over unbundled network elements," and that the level of local competition occurring in Missouri is disappointing.[100] There is little wonder as to the cause of Staff's disappointment. SWBT has systematically engaged in a pattern of anti-competitive conduct in Missouri that has precluded meaningful facilities-based service competition from developing. This is a fact that SWBT does not dispute. Indeed, SWBT's conduct and its testimony in this proceeding demonstrate that it intended to keep competitive local exchange carriers ("CLECs") from engaging in facilities-based competition until it received approval to provide in-region, interLATA service. SWBT refused to recognize CLEC facilities-based customers as MCA participants even though it recognized CLEC resale, UNE-P and ported customers as MCA participants. SWBT refused to negotiate a good faith solution to its screening of CLEC MCA NXX codes, and resisted every effort of the CLECs to obtain access to the MCA via interim relief in the MCA docket (Case No. TO-99-483). SWBT imposes excessive rates and

[99] *Id.* at pp. 2773-75

[100] MPSC Case No. TO-99-227, *Staff Response to October Q & A Session* filed October 26, 2000, Affidavit of William Voight, par. 24.

anti-competitive terms for provisioning of UNEs and collocation services, and has resisted every effort of the CLECs to require it to file a collocation tariff until just recently and, then, only as a result of events in this proceeding.

At the Q&A Session, however, SWBT essentially promised to clean up its act – *but only on the condition of a favorable recommendation from the Commission re 271 approval!* SWBT witness Thomas Hughes highlighted the fact that SWBT had not at the time of the hearing in TO-99-227 satisfied the Competitive Checklist, by indicating that if the M2A is approved, SWBT would then be in compliance with the Competitive Checklist. (SWBT, Hughes, Tr. 2314). SWBT witness Becky Sparks confirmed that the availability of the M2A (and, thus, SWBT's compliance with the Competitive Checklist) is conditioned on a favorable recommendation from the Commission on SWBT's 271 application. (SWBT, Sparks, Tr. 2597). This testimony, together with SWBT's above-noted history of creating barriers to CLEC facilities-based competition, leads to the inescapable conclusion that SWBT intended to delay and block CLEC efforts to provide facilities-based services in Missouri until it was granted authority to provide interLATA services in Missouri. This conduct has been very harmful to CLECs operating in Missouri, as the ability to offer facilities-based services is crucial.

G. Impact of SWBT's Anti-Competitive Conduct

The ability of CLECs to provide facilities-based services in a particular market is essential to the analysis of whether such market is truly open to competition and as to whether such market will remain open. Absent an entire lack of competition in its markets, the next best alternative for SWBT is for its competitors to provide resale services, instead of facilities-based services. This is better for SWBT financially, since competitors must purchase service from SWBT with only a thin margin, if any. It is also better for SWBT competitively, since CLECs are forced to sell the same products and services offered by SWBT, with only a very limited ability to offer competitive choices to customers. Conversely, a CLEC providing facilities-based services has much better

margins and is able to offer its customers significantly greater choices of products and services. It is virtually axiomatic that the resale of an incumbent local exchange carrier's (ILEC) services, though a means to market entry, is not a viable long term business option for CLECs. SWBT understands this. By blocking or delaying the ability of CLECs to provide facilities-based services, SWBT undermines the viability of the entire CLEC industry to compete in its markets.

VIII. THE CONSULTANT REPORT OF ERNST AND YOUNG IS NOT AN ADEQUATE BASIS FOR RECOMMENDING 271 APPROVAL

The Ernst and Young Interim Report raises numerous questions about SWBT's performance and indicates that SWBT's performance measures system has failed to portray accurately the actual experience of CLECs in Missouri. The report also indicates that significant and material problems exist with respect to SWBT's meeting of key performance measures. The report also indicates that far too many assumptions have been made for Missouri CLECs based upon Texas information. The Report lacks sufficient information to enable parties to understand how Ernst and Young arrived at its conclusions. It is virtually impossible for parties other than Southwestern Bell to be able to look at how Ernst and Young got from the procedures they say they executed to their ultimate conclusion. Transcript of Proceedings Case No. TO-99-227, pp. 2737-38, 2761, 2762.

The Ernst and Young Report indicates that SWBT's performance measures system has failed to portray accurately the actual real world experience of CLECs in Missouri and identifies significant and material problems with respect to SWBT's meeting of key performance measures. Furthermore, the Report relies too heavily on SWBT's experiences in Texas. SWBT's performance measures and OSS should be tested more specifically and extensively in Missouri after SWBT has established a track record of

operating under an interconnection agreement that complies with applicable laws and regulations.

IX. CONCLUSION

As this Commission has indicated that Bell Operating Companies "hold the keys of their success with respect to Section 271 approval in their own hands."[101] McLeodUSA respectively summits that if SWBT would not have spent the better part of the last two years attempting to prevent CLECs from offering facilities-based services in MCA markets and in resisting (up until only very recently) the efforts of CLECs to require SWBT to file a collocation tariff, SWBT would likely have a much better, if not the requisite, record for obtaining Section 271 approval. SWBT's conduct toward CLECs has prevented CLECs from obtaining the requisite adequate knowledge of SWBT's OSS systems and loop provisioning abilities. Furthermore, SWBT's anti-competitive conduct is not in the public interest and should not be rewarded with 271 approval.

[101] Staff Response to Second Q&A Session p. 32, "Application of Bell South Corporation et al for provision of in-region, inter-LATA services in Louisiana", cc Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order, 13 F.C.R. 2059 (October 13, 1998) (Second Bell South Louisiana Order), p.9.

For the reasons stated above McLeodUSA respectfully requests that the Commission deny SWBT's Application or, in the alternative, that the Commission withhold approval of SWBT's Application until SWBT is in compliance with the Competitive Checklist and is able to demonstrate that its provision of interLATA service is in accordance with the public interest.

Respectfully submitted,

_____

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ATTORNEY FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC.

Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

In the Matter of	)	
	)	
Application by SBC Communications, Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 01-88
Southwestern Bell Communications Services, Inc.	)	
d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Missouri	)	

AFFIDAVIT OF FRANK E. SCHWARTZ

STATE OF IOWA	)
	) ss
COUNTY OF	)

Frank E. Schwartz, being first duly sworn on oath, deposes and states as follows:

1. I am over 18 years of age and I am personally familiar with the facts and circumstances stated herein and I am competent to testify thereto as a witness.

2. I am employed by McLeodUSA as Senior Manager, Service Delivery and am responsible for overseeing orders submitted to Southwestern Bell Telephone Company ("SWBT") for processing.

3. The purpose of this Affidavit is to discuss the significant problems that McLeodUSA continues to experience with SWBT's operational support systems that McLeodUSA must use to submit orders to provide service to McLeodUSA's end user customers.

4. Based on my experience, I believe approximately 15-20% of McLeodUSA orders submitted to SBC that are accepted through its automated LEX system are manually rejected by SBC's order writers without a valid reason. When McLeodUSA has

sought additional information to explain these manual rejections, SBC personnel have been extremely uncooperative toward McLeodUSA.

5. For those orders rejected by SBC without adequate explanation, McLeodUSA typically has to make several additional unsuccessful attempts at submitting the order to SBC until the order is finally permitted to be escalated to an SBC manager. My experience is that the SBC manager typically accepts the order as first submitted by McLeodUSA, but not before McLeodUSA has experienced much delay and frustration in submitting the order.

6. Additionally, many orders submitted correctly to SBC by McLeodUSA are incorrectly entered by SBC order writers. I believe this type of error occurs on approximately 15-20% of all orders submitted by McLeodUSA for basic business (1FB) and UNE-P platform orders.

7. The impact of the poor order processing performance to McLeodUSA and its customers is harmful. McLeodUSA's customers experience significant service impacting issues such as loss of features, loss of long distance access, along with the resulting delays occasioned by SBC requiring McLeodUSA to resubmit the order.

8. SBC also routinely fails to properly execute supplemental change order dates. These types of orders are submitted when a new McLeodUSA customer seeks to change the initial cut-over date set unilaterally by SBC to a new date. In these instances, SBC fails to recognize the change order and proceeds to process the disconnect order on the original cut-over date, which causes loss of dial tone, immense customer confusion and frustration for McLeodUSA's new customer. This problem happens on approximately 90% of all supplemental change order dates and causes huge competitive problems for McLeodUSA, as its new customer typically perceives this as a problem caused by McLeodUSA, when in fact it is solely the fault of SBC.

9. SBC consistently provisions service to its own new customers faster than it provisions service for McLeodUSA's new customers. This results in new customer losses of at least ten (10) percent in its Missouri markets.

10. SBC is currently rejecting all orders from McLeodUSA for UNE-P service for McLeodUSA's MCA customers. Prior to this blanket rejection policy, any McLeodUSA customers who selected MCA service in the optional tiers and who were provisioned service via UNE-P, automatically lost MCA service and had to have service re-ordered via resale. SBC has not provided an explanation for why this is occurring, and has not otherwise corrected the problem. SBC's order system is rejecting all orders for UNE-P submitted by McLeodUSA on which an MCA option is indicated. The error message provided by SBC's system to McLeodUSA indicates that an invalid feature request has been submitted. Information provided by SBC's toolbar system lists available features for one FB resale and UNE-P. However, when this database is accessed with an MCA prefix the system indicates that the MCA feature is available for resale but not for UNE-P.

FURTHER AFFIANT SAYETH NOT.

/s/ Frank E. Schwartz
FRANK E. SCHWARTZ

SUBSCRIBED AND SWORN TO before me on this 24th day of April, 2001.

_____
Notary Public for Iowa
Residing at Linn County
My Commission Expires _____